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81-2191

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT J. MAYBERRY,
Petitioner,

v.

WILLIAM DEES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals acted contrary to this Court's decision in *Mt. Healthy City Board of Education v. Doyle*, when it required petitioner to carry the burden of proving not only that speech protected by the First Amendment was a substantial cause of respondent's decision to deny him tenure, but also that he would have been granted tenure in the absence of that speech.

2. Whether the court of appeals adopted rules that violate the fundamental principles this Court has established to define the respective functions of judges and juries, when it weighed the evidence for itself and in the course of doing so:

a. held that an issue cannot be submitted to a jury if in the court's view the evidence on that issue is evenly balanced; and

b. determined that the evidence was not sufficient to support the jury's verdict by means of a "statistical" analysis, assigning arbitrary numerical values to the plaintiff's likelihood of success on two factual issues, and multiplying them together to obtain a single numerical value that the court found was "less than a scintilla."

LIST OF PARTIES

In addition to the parties named in the caption, the following persons were defendants in the district court, were appellees and cross-appellants in the court of appeals, and are respondents here:

William Friday
Robert Morgan
Leo W. Jenkins
Robert L. Holt
Robert W. Williams
Richard Capwell
Joseph Fernandez

There were no other parties to this proceeding in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert J. Mayberry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on November 5, 1981.

OPINIONS BELOW

The judgment of the district court is unreported; it is printed herein as Appendix C (50a-53a). The opinion and order of the district court denying the parties' post-judgment motions is also unreported; it is printed herein as Appendix B (38a-49a). The opinion of the court of appeals is reported at 663 F.2d 502 (CA4 1981), and is reprinted herein as Appendix A (1a-37a).

JURISDICTION

The court below entered judgment on November 5, 1981, Appendix D (54a), and denied a timely petition for rehearing on December 28, 1981, Appendix E (55a). On March 18, 1982, Chief Justice Burger extended the

time for filing this petition to and including May 27, 1982, Appendix F (56a).

This Court has jurisdiction to review the judgment of the court of appeals by certiorari, pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I, provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment VII, provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure, Rule 38(a), provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

In the spring of 1972 petitioner Robert J. Mayberry, a faculty member in the department of romance languages of East Carolina University ("ECU"), was denied tenure by respondents, all of whom were ECU officials. ECU is a state university located in Greenville, North Carolina. Petitioner filed this action, alleging that

the denial of tenure had been motivated by his exercise of rights protected by the First and Fourteenth Amendments to the U.S. Constitution.[1] The case was tried to a jury in 1978, and the jury returned a verdict in favor of Mayberry, finding, on special interrogatories, both that Mayberry's protected speech was a substantial cause of the denial of tenure and that respondents would not have taken the same action in the absence of that speech. The court of appeals set aside the jury's verdict on the ground that the evidence was not sufficient to support those findings.[2] The rules that the court announced as grounds for its action are the subject of this petition. Given that procedural posture, it is necessary to set forth briefly the evidence that supports the jury's verdict on the two issues pertaining to the causal relation between the protected speech and the denial of tenure.

The Evidence Relating to the Causation Issues

In the fall of 1971, ECU launched a "Self-Study" in preparation for its decennial accreditation by the Southern Association of Colleges and Schools. One of the subjects covered by the Self-Study was departmental organization and administration, and each department was instructed to form an internal committee to study that subject. Mayberry's department chairman, respondent Fernandez, named four persons to serve on that com-

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[1] The action was brought pursuant to 42 U.S.C. § 1983, and the District Court's jurisdiction was founded on 28 U.S.C. §§ 1331 and 1343.

[2] The court of appeals also set aside the jury's verdict in favor of Mayberry on an independent claim for breach of contract under state law, based on allegations that in several particulars defendants' actions had violated the ECU faculty manual. The grounds that the court of appeals relied upon for doing so were the same grounds that it used to set aside the verdict on the First Amendment claim (36a-37a n.43). Accordingly, the arguments set forth in Part II of this petition apply equally to the First Amendment claim and the pendent state claim.

mittee: Fernandez himself, his wife, the wife of another department chairman, and a student.[3]

Mayberry for some time had believed that Fernandez was becoming increasingly more autocratic and eliminating many elements of faculty self-governance and academic freedom within the department. Mayberry saw the Self-Study as an opportunity for faculty members to bring these problems to the attention of higher-level administrators. When he learned of Fernandez's appointments to the organization and administration committee, however, he concluded that Fernandez had "stacked" the committee to stifle such criticism. Concerned about the integrity of the Self-Study and the long-range interests of the department, Mayberry took several actions to prevent the result he feared. He went from door to door within the department, urging his faculty colleagues individually to voice their concerns in the Self-Study despite the make-up of the committee. He assisted his wife, who was also a faculty member in the department, in writing an anonymous letter to the University-wide steering committee that had the responsibility of overseeing the Self-Study. He followed up his wife's letter by visiting the chairman of the steering committee and expressing his concern in person. Finally, when the time came for faculty members to complete their Self-Study questionnaires and submit them to the departmental office, Mayberry expressed his criticism of Fernandez in the questionnaire that he submitted. That questionnaire, by University design, was unsigned.

Within three months after the completion of the Self-Study, Mayberry received notice that he had been denied tenure based on the recommendation of Fernandez. It

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[3] Mrs. Fernandez and the other department chairman's wife were both members of the faculty of the romance languages department. Unlike many universities, ECU had no policy forbidding employment of husbands and wives in the same department, even where one was chairman of that department.

was undisputed that Fernandez's recommendation was the sole cause of the denial of tenure. The proof at trial thus focused on whether Fernandez, in making that recommendation, meant to retaliate against Mayberry for his critical speech in connection with the Self-Study.

The key evidence at trial was testimony that Fernandez, on three separate occasions, had stated that he would not give tenure to Mayberry because Mayberry was a "troublemaker," referring to the criticism in connection with the Self-Study. The first of those three statements was related by Thomas Williams, a professor in the department. He testified that shortly before the tenure decision he recommended to Fernandez that Mayberry be given tenure. Fernandez responded that "Professor Mayberry was out of the question because he was a troublemaker" (Tr. 177). The second statement was also related by Williams. A few weeks after the first conversation, and shortly after the tenure decision, Williams asked Fernandez to reconsider the denial of tenure to Mayberry. Williams testified:

> At that time, Professor Fernandez said to me, "No. Professor Mayberry was a troublemaker," and then he went on to specify that during the Self-Study, Professor Mayberry had said and made critical remarks about the Department and that he could not have somebody like that tenured in the Department.

(Tr. 177-78). Fernandez made the third statement about six weeks after the denial of tenure. Mayberry's wife testified that Fernandez called her into his office. She directly asked Fernandez why he had recommended that her husband be denied tenure. Fernandez answered by saying that Mayberry was a "troublemaker," who had been "going around the Department stirring up trouble" for Fernandez in connection with the Self-Study.[4]

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[4] The full text of Mrs. Mayberry's account of this statement is as follows:

> I asked why he had been so cruel as to grant me a job and not my husband. He waved a copy of the self-study at me and

Other evidence supported petitioner's allegation that Fernandez acted out of a retaliatory motive. In May 1972, immediately following the denial of tenure, Mayberry complained of that decision within ECU channels. While that complaint was pending, Fernandez called petitioner into his office. He angrily described Mayberry's actions during the Self-Study as "stirring up trouble," and added that if Mayberry continued "to cause him trouble" he would not allow him to complete the academic year but would fire him before his contract expired (Tr. 121-22).

Finally, there was evidence that Fernandez's explanation of his recommendation against tenure was only a pretext. Fernandez testified that his department was over-staffed, and for that reason he could not recommend tenure for Mayberry. Four other faculty members were up for tenure at the same time, however, and he recommended tenure for all of them. He testified that in his judgment Mayberry, of the five, was the least deserving of tenure. Two of those that he recommended for tenure, however, had only master's degrees while Mayberry had a Ph.D., and Fernandez conceded that it was ECU's policy to upgrade its faculty by trying to grant tenure only to persons with doctoral degrees. Fernandez also conceded that he had advised nontenured faculty members the preceding year that they could not expect to be considered for tenure without a Ph.D.

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began reading comments from it. He said "I could read between the lines. I knew who made these comments. I knew your husband was a troublemaker; that it was your husband who was going around the Department stirring up trouble for me and having people make these comments."

"But now, I wonder if maybe you were the one, that you were also critical."

(Tr. 36-37).

The District Court Proceedings

Respondents moved for a directed verdict at the end of Mayberry's case and at the close of all the evidence; both motions were denied, and petitioner's claims were submitted to the jury. The jury returned a verdict on special interrogatories, finding: (1) that the decision not to continue Mayberry's employment was "motivated and substantially caused by [his] criticism of his Department Chairman," (2) that respondents would not have taken the same action in the absence of that criticism; and (3) that Mayberry should recover actual damages, as well as $5,000 in punitive damages from Fernandez as an individual (50a-51a).[5] Respondents moved for judgment notwithstanding the verdict or in the alternative for a new trial. The district court denied the motions, holding that the jury's verdict was supported by the evidence (47a-48a). Respondents appealed this ruling to the Court of Appeals for the Fourth Circuit.[6]

The Decision of the Court of Appeals

The court of appeals reversed the judgment. The court held that Mayberry's criticism of Fernandez in connection with the Self-Study was protected by the First

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[5] The jury was not asked to fix the amount of actual damages; by stipulation of the parties the trial judge fixed the actual damages at the sum of $81,885—the salary that Mrs. Mayberry had earned in the five years between the end of petitioner's employment at ECU and the trial (51a-52a).

[6] Respondents raised several other issues on appeal, and Mayberry cross-appealed on issues pertaining to relief. The only questions that the court of appeals addressed in its decision were (1) whether Mayberry's criticism of Fernandez was protected speech, and (2) whether the evidence was sufficient to support the jury's finding that Mayberry's rights were violated.

Amendment (14a, 34a-35a), but concluded that the evidence was not sufficient to support the verdict for Mayberry on the question whether that protected speech was the reason for Fernandez's recommendation to deny tenure. On the latter issue—the causal relation between the speech and the denial of tenure—the court held that Mayberry had to carry the burden of proof on two factual issues: (1) that respondent Fernandez knew about the protected speech before making the recommendation to deny tenure, and (2) that without the protected speech Mayberry would have been given tenure (18a-19a). With that holding as a predicate, the court of appeals examined the record and held that on each of these issues considered alone the evidence was weak or inadequate, and that, in any event, with the two issues combined in a "statistical" analysis—assigning numerical values to Mayberry's likelihood of success on each of the two issues and multiplying them together—the probability that petitioner's allegations were true on both issues was too small to support the jury's verdict. In order to understand the court of appeals' decision, it is necessary to describe briefly the essential steps in the court's analysis.

1. The court held that the testimony describing Fernandez's admissions was not sufficiently probative to support the jury's verdict on either of the two issues. Rejecting Mayberry's contention that the jury properly could find that Fernandez had admitted his unconstitutional motive, the court held that that argument was "simply too thin, considering the evidence as a whole" (15a). To the court, Fernandez's remarks were "*much more probative*" of respondents' contention that Fernandez had not learned of Mayberry's criticism until after the denial of tenure (*id.*; emphasis added).[7]

[7] This statement was made in support of the court's rejection of the second and third admissions, but not of the first (which preceded the recommendation to deny tenure and thus could not be explained as evidence of after-acquired knowledge). The court of

2. Disregarding the testimony of Fernandez's out-of-court admissions, the court stated that the only evidence relevant to the issue whether Fernandez knew of Mayberry's protected speech at the time of his recommendation was Fernandez's admission on the witness stand that he "possibly" knew (12a, 14a).[8] The court of appeals held that this in-court admission was not sufficient to support the jury's verdict, saying that an issue on which the evidence is evenly balanced cannot be submitted to the jury:

> A statement that one possibly knew implies that he possibly did not know, leaving things very close to an even balance. Chief Judge Sobeloff put it well

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appeals ruled out the first admission as a basis for the jury's verdict on the different ground that while Fernandez used the word "troublemaker" on that occasion to describe his reason for not giving Mayberry tenure, he did not explain at that time what he meant by it (12a). The court said that there was "no showing" that Fernandez used that word in reference to the Self-Study criticism (*id.*).

[8] That admission was made in the following context. In the course of his direct examination, Fernandez testified that he did not learn of petitioner's criticisms until after he had recommended denial of tenure. The district court interposed and asked a series of pointed questions:

> THE COURT: Had the tenure decision been made when this information came to your attention?
>
> THE WITNESS: Yes, sir. The memorandum—
>
> THE COURT: (Interposing) I am not talking about the memorandum. I am talking about any information that had been critical of you.
>
> THE WITNESS: It had been made in my mind.
>
> THE COURT: Had any information that this Plaintiff Mayberry had been critical of you come to your attention before your decision concerning his tenure?
>
> THE WITNESS: Possibly, yes. (Tr. 287-88).

At 12a-13a the court of appeals quoted Fernandez's later attempt to explain this admission.

> when he observed that an issue can only be submitted to the jury when it is supported by "[e]vidence which shows a 'probability' and not a mere 'possibility.'"

(14a-15a).

3. After similarly weighing the evidence on the issue whether Mayberry would have been granted tenure in the absence of his protected speech,[9] the court of appeals looked at the two issues in combination. The court assumed that the evidence "on either factor, standing alone, while weak, still . . . would have sufficed for a jury verdict in Mayberry's favor" (18a). The court then used a "statistical" analysis to determine whether the evidence was adequate to carry petitioner's burden on the two issues combined. It assigned a 5% "value" to petitioner's likelihood of success on one issue, and 8% to the other, then multiplied them together.[10] That

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[9] The court of appeals found that the evidence on this issue strongly favored respondents. *See* 14a, 19a, 30a n.35. The court gave particular emphasis to an evaluation signed by Fernandez in May 1971 (but not mentioned in his testimony) that stated, "If reduction in staff is forced upon us, would hesitate to give [Mayberry] tenure. Otherwise, would not object" (7a). Because Fernandez testified that departmental overstaffing in 1972 made it necessary to deny tenure to one of the five candidates and that in his opinion Mayberry was the least worthy of the five candidates (13a n.19), the court of appeals concluded that there was "an abundance of proof" and a "strong probability" that Mayberry would have been denied tenure in any event (19a; 30a n.35). (As we show in note 17, *infra*, all of this evidence depended on Fernandez's credibility.)

[10] It is not entirely clear from the court's opinion what likelihood the probability figures were supposed to reflect. The court seemed at one point to refer to the likelihood that petitioner could satisfy the jury that his contentions were true (*see* 18a), and at another point to refer to the likelihood that those contentions in fact were true (*see* 19a). The difference is immaterial, however, because the method of analysis is invalid in either case (*see* pages 20-22, *infra*).

process yielded a value of 0.004 for "the causality percentage of the case." To the court, that figure was "less than a scintilla" and required the conclusion that petitioner had not met his burden of proof (18a-19a).[11] The court summarized its holding on this point by saying:

> All in all, therefore, *both obstacles in Mayberry's path, combined, have proven too much for him to overcome*, even assuming that, had but one of them existed, his evidence would have been sufficient to surmount it.

(19a; emphasis added).

REASONS FOR GRANTING THE WRIT

The court of appeals refused in this case to follow this Court's established rules in two crucial respects. First, its ruling that Mayberry had the burden of proving that he would have been granted tenure in the absence of his protected speech is directly contrary to the rules this Court adopted in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Second, the court of appeals refused to follow the fundamental principles that this Court has fashioned to govern the allocation of functions between judges and juries in the federal courts.

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[11] The passage in which the court of appeals described this analysis reads as follows:

> Let us, as best we may, recognizing that we thereby substitute an apparent simplicity for an actual complexity, assign values of 5% and 8% likelihood respectively. If one of them had been at the virtual certainty level, the case would hold at the 5% to 8% range of probability. But both were far from the virtual certainty level, and multiplication of the two, one against the other, yields a figure of less than .005. That is, the causality percentage of the case, for which Mayberry, as plaintiff, had the burden of proof was but 4/10ths of 1%. Put another way, it is 99.6% certain that denial of tenure was not associated with the protected criticism. In the real, everyday world, the residual 4/10s of 1% is less than a scintilla, and the case falls for failure of proof.

(18a-19a; footnote omitted).

Specifically, the court of appeals weighed the evidence as if it were sitting as the trier of fact and, in the course of doing so, announced two rules that expressly contemplate such a weighing of the evidence. The first is a rule that was long ago disapproved by this Court, that a jury verdict cannot stand if the court weighs the evidence and finds it evenly balanced. The second is a new rule that uses numerical probabilities in a way that violates principles of both law and statistics. The decision of the court of appeals is squarely at odds with the governing precedents of this Court, and if allowed to stand, will have the effect of permitting, if not requiring, the district courts in the Fourth Circuit to usurp the jury's function.

I. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE DECISION OF THIS COURT IN *MT. HEALTHY CITY BOARD OF EDUCATION V. DOYLE*

In *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court adopted rules to govern allocation of the burden of proof in cases exactly like this one. The Court held that the plaintiff's burden is to prove by a preponderance of the evidence that speech protected by the First Amendment was a "substantial" or "motivating" factor in the defendants' decision not to renew his employment. 429 U.S. 287. If the plaintiff carries that burden, the defendant may attempt to prove that "it would have reached the same decision as to [plaintiff's] re-employment even in the absence of the protected conduct." *Id.* The burden is on defendants to prove this second proposition by a preponderance of the evidence. *Id.* No different rule applies in the case of a decision to deny tenure; in *Mt. Healthy* itself a decision to renew would have conferred tenure on the plaintiff, and the Court took this factor into account in deciding where to lay the burden of proof. *Id.* at 286.

The jury in this case was properly instructed in accordance with the rules of *Mt. Healthy*, and petitioner's brief in the court of appeals clearly described those rules

and their application here.[12] Nonetheless, the court of appeals did not follow *Mt. Healthy*, but instead imposed upon Mayberry the burden of proving by a preponderance of the evidence, as part of his case in chief, that he would have been granted tenure in the absence of his protected speech.[13] The other courts of appeals have rendered decisions in a large number of cases under the rules announced in *Mt. Healthy*; this is the only court of appeals decision that has refused to follow this Court's ruling.[14]

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[12] The jury instructions appear at Tr. 523-25; the petitioner's discussion of the issue is in Reply Brief for Plaintiff-Appellant, at 14-16.

[13] The clearest statements of the court's assignment of this burden to Mayberry appear in the "causality" section of the opinion and at the end. As we described above, at page 8, when the court undertook its "statistical" analysis, it identified two elements of "the causality percentage of the case, for which Mayberry, as plaintiff, had the burden of proof" (19a) but had failed to prove: one of those elements was petitioner's likelihood of receiving tenure in the absence of the protected speech (18a). Later in the opinion, the court cited *Mt. Healthy* and discussed it, stating that because of petitioner's "failure to prove essential items of [his] case in chief" the question of a "burden shift" to defendants did not arise (30a n.35). Finally, in holding petitioner's speech protected, the court further underscored its assignment of the burden to petitioner, saying:

> We are loath to say that there was no First Amendment dimension whatever to utterances by Mayberry so that, *even had the evidence sufficed to support a finding that, if Mayberry's criticisms had not been made, Fernandez demonstrably was prepared to recommend him favorably for tenure*, still Mayberry could not have recovered.

(35a; emphasis added). *See also* 14a, 34a.

[14] The same basic issue was raised in the petition for certiorari in *Connick v. Myers*, No. 81-1251, *petition for cert. granted*, 50 U.S.L.W. 3715 (Mar. 8, 1982). In *Connick* the lower courts applied the *Mt. Healthy* rule, and the petitioner's third "question presented" appeared to seek reconsideration of the *Mt. Healthy* burden-of-proof rules. The petitioner's brief in *Connick* has now been filed, and it does not argue for reconsideration of those rules. Brief for Petitioner in No. 81-1251, at 12-14.

II. THE RULES THAT THE COURT OF APPEALS ADOPTED AS GROUNDS FOR OVERTURNING THE JURY VERDICT IN THIS CASE VIOLATE THE FUNDAMENTAL PRINCIPLES THAT DEFINE THE RESPECTIVE ROLES OF JUDGES AND JURIES IN THE FEDERAL SYSTEM.

The most fundamental principle in the federal system concerning the allocation of functions between judge and jury is that it is the exclusive province of the jury to weigh the evidence. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-01 (1962); *Tennant v. Peoria & P. U. Ry.*, 321 U.S. 29, 35 (1944). In order to preserve the jury's exclusive right to resolve disputed issues of fact, this Court has fashioned rules that restrict the inquiry of the trial court when it is called upon to take a case away from a jury by directed verdict or to set aside a verdict by judgment n.o.v. The same rules that govern the trial court's decision in regard to those motions also govern the inquiry of a court of appeals in reviewing the grant or denial of a directed verdict or judgment n.o.v.[15] *See Continental Ore Co., supra*, 370 U.S. at 696 n.6; *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940); 9 Wright & Miller, Federal Practice & Procedure § 2524, at 541-42 (1971). Under those rules, the role of the court is not to decide how it would weigh the evidence if it were in the jury's place, but only to determine whether the record contains probative facts that rationally support the jury's verdict, *Myers v. Reading Co.*, 331 U.S. 477,

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[15] The practical difference, of course, is that on motion for directed verdict the district court is to decide whether the evidence properly could support a verdict for the opponent of the motion, while on motion for judgment n.o.v. the question is whether the evidence properly supports the verdict that the jury reached. The discussion in text is cast primarily in terms of setting aside a verdict—since that is what the court of appeals did here—but the rules the court announced would lead equally to a decision to take the issue away from the jury in the first place by directing a verdict.

485 (1947), giving the evidence all the inferences that can reasonably be drawn consistent with the verdict. *Continental Ore Co., supra*, 370 U.S. at 696; *Galloway v. United States*, 319 U.S. 372, 395 (1943). If the record does contain probative evidence that supports the jury's verdict, the existence of contrary evidence—no matter how persuasive it may be to the court—is irrelevant. *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946); *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U.S. 405, 408-09 (1894). These principles are, at least in part, guaranteed by the Seventh Amendment. *Galloway v. United States, supra*, 319 U.S. at 394-96.

The court of appeals departed from these fundamental principles in this case. Its basic error was in weighing the evidence for itself. In doing so, the court of appeals not only violated these fundamental principles itself, but it also announced two rules of law that have the effect of authorizing the lower courts to violate them as well.

A. Throughout its opinion the court engaged in a frank process of weighing the evidence to its own satisfaction: rejecting evidence that supported the jury's verdict as "very weak" (14a) or "attenuated" (19a), or as entitled to "[n]o great weight" (16a); and concluding that evidence contrary to the jury's verdict constituted an "abundance of proof" (30a n.35), or established a "strong probability" (19a). The court's treatment of Fernandez's three admissions of improper motive is the clearest example—and the one most crucial to the outcome—of the court's weighing of the evidence.

Under the established rules for review of jury verdicts, the jury was entitled to believe the testimony of petitioner's witnesses that Fernandez on three occasions had admitted that Mayberry's protected speech was his reason for not recommending tenure.[16] That testimony, if

[16] Although in the first of the three statements Fernandez did not explain his use of the term "troublemaker," he explicitly re-

believed by the jury, was enough by itself to support the jury's finding that Mayberry's protected speech played a substantial part in Fernandez's decision to recommend denial of tenure. It was likewise probative on the "same decision anyway" question framed by *Mt. Healthy*. Fernandez's credibility was crucial to the contention that Mayberry was denied tenure due to overstaffing because he, among the five candidates for tenure, was the least worthy. If the jury resolved the credibility question against Fernandez and found that he had admitted an improper motive, it could properly infer from that fact alone, or in combination with other relevant evidence, that Fernandez's assertion that petitioner was the "least worthy" candidate for tenure was only a pretext.[17]

The court of appeals did not hold that the jury was somehow foreclosed from drawing these inferences from

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ferred to petitioner's Self-Study activities in explanation of the term "troublemaker" in the second and third statements. The jury was entitled to infer that his use of that word meant the same thing on all three occasions.

[17] All of the evidence respondents offered in support of this contention depended on Fernandez's credibility. Fernandez's conclusory statement that Mayberry was the least worthy candidate for tenure was not backed up by any specific testimony comparing Mayberry to the other candidates. Although respondents placed in evidence several anonymous evaluations of Mayberry by other faculty members, of whom some recommended tenure and some did not (6a-7a), they did not offer the corresponding evaluations of the successful tenure candidates. Moreover, those anonymous evaluations could not furnish evidence on this issue independent of Fernandez's credibility; because of the obvious hearsay problems, they were not admitted to prove the truth of their contents, but only for the limited purpose of showing that "the statements were made and were before Dr. Fernandez and considered by him for whatever they were worth in making his determination if you [the jury] find that he made any reference to them at all." (Tr. 366). Finally, in regard to the evaluation that Fernandez signed in May 1971 (*see* note 9, *supra*), the jury's apparent decision not to credit it may be explained by the fact that Fernandez did not mention that evaluation in his testimony, not even so much as to identify the document.

the admissions. Nor did it even pretend to adhere to the rule requiring it to give Mayberry the benefit of all reasonable inferences in support of the jury's verdict. Instead, by indulging its own interpretation of the testimony and finding that the evidence of Fernandez's admissions was "much more probative" of respondent's contentions than of petitioner's (15a), the court usurped the jury's exclusive function. As this Court has unequivocally held:

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Tennant v. Peoria & P. U. Ry., supra, 321 U.S. at 35.

B. The "even balance" rule that the court announced in the course of weighing the evidence is just a thinly veiled justification for substituting the court's assessment of the evidence for that of the jury. For that reason, the proposition that the court of appeals announced—that a court must direct a verdict when it finds that the facts give equal support to both sides—has been discredited by this Court and rejected by most of the lower courts that have addressed it.

In *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333 (1933), this Court held that where the facts give equal support to two inconsistent hypotheses, they prove neither, and judgment as a matter of law must go against the party with the burden of persuasion. *Id.* at 339-40. A number of courts have interpreted *Chamberlain* to mean that a trial court can direct a verdict if it believes the evidence to be evenly balanced.[18] On the facts of *Chamberlain*, however, the Court's statement can be regarded instead as a holding that the evidence in that case could not rationally support a conclusion that the

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[18] See note 21, *infra*.

plaintiff had carried his burden of proof.[19] That interpretation of *Chamberlain* is compelled in view of this Court's later holding in *Tennant v. Peoria & P.U. Ry. Co.*, *supra*. In that case the Court held that in a jury trial the law does not allow a court to weigh the evidence for itself to decide whether it believes the evidence is evenly balanced. In a passage that seems to be addressed specifically to *Chamberlain*, but which does not cite it, the Court said:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.

321 U.S. at 35. Despite *Tennant*, some courts have interpreted *Chamberlain* to authorize taking a case away from the jury if the court believes the evidence to be in equipoise. On one occasion when a court of appeals set aside a jury verdict on that ground, this Court granted certiorari and reversed the judgment summarily. *Carolina Life Ins. Co. v. Williams*, 210 F.2d 477 (CA5), *rev'd without opinion*, 348 U.S. 802 (1954).

The "even balance" rule announced by the court of appeals in this case authorizes what *Tennant* forbids. In

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[19] It is well accepted that if the trier of fact finds that the evidence is in equal balance, it must return a verdict against the party with the burden of persuasion. *See, e.g., Phillips v. SEC*, 388 F.2d 964, 970-71 (CA2 1968). In addition, if a trial court concludes, without weighing the evidence and after giving the party with the burden of proof the benefit of all rational inferences, that the evidence does not give the jury any grounds for a rational conclusion that the burden of proof has been satisfied, the trial court can properly direct a verdict against the party who has that burden. *See, e.g., Epoch Producing Corp. v. Killian Shows, Inc.*, 522 F.2d 737, 744-45 (CA2 1975), *cert. denied*, 424 U.S. 955 (1976); *Haldeman v. Bell Tel. Co.*, 387 F.2d 557, 559 (CA3 1968); *Aluminum Co. of America v. Preferred Metal Prods.*, 37 F.R.D. 218 (D.N.J. 1965), *aff'd*, 354 F.2d 658 (CA3 1966).

light of Fernandez's in-court admission that he "possibly" knew of the protected speech when he made his recommendation, resolution of the question of Fernandez's knowledge rested in large measure on his credibility. Assessing his credibility was exclusively a function for the jury, and the court of appeals could not find the evidence on the knowledge issue evenly balanced without judging Fernandez's credibility for itself. The "even balance" rule applied by the court of appeals thus squarely contradicts the holding of *Tennant*.

The court of appeals in this case is not the only court to make this error. Even though a majority of the lower federal courts have understood that this Court's modern decisions do not allow such a practice,[20] other courts from time to time have used *Chamberlain* to justify setting aside a jury verdict when they found the evidence gave equal support to both sides.[21] In this state

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[20] *See, e.g., Wratchford v. S. J. Groves & Sons Co.*, 405 F.2d 1061, 1067 (CA4 1969); *Yeager v. J. R. Christ Co.*, 364 F.2d 96, 100 (CA3 1966); *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 592 n.8 (CA2 1961); 9 Wright & Miller, Federal Practice and Procedure, § 2528, at 567-69.

[21] *See, e.g., Pittman v. West American Ins. Co.*, 299 F.2d 405, 411 (CA8 1962); *Jellison v. Kroger Co.*, 290 F.2d 183, 185-86 (CA6 1961); *Ford Motor Co. v. Mondragon*, 271 F.2d 342, 345 (CA8 1959); *Armstrong v. Commerce Tankers Corp.*, 311 F.Supp. 1236, 1240-41 (S.D.N.Y. 1969), *aff'd on other grds*, 423 F.2d 957 (CA2 1970), *cert. denied*, 400 U.S. 833 (1971). There are other cases in which a court cited the *Chamberlain* rule as the law, but did not apply it to overturn a jury verdict. *E.g., South-East Coal Co. v. Consolidated Coal Co.*, 434 F.2d 767, 777 (CA6 1970); *Calvert v. Katy Taxi, Inc.*, 413 F.2d 841 (CA2 1969); *Seganish v. District of Columbia Safeway Stores*, 406 F.2d 653, 656 n.21 (CA DC 1968); *Weil v. Keshner*, 300 F.2d 500, 503-04 (CA8 1962). There are yet other cases in which a court cited the *Chamberlain* "equal inferences" rule and overturned a jury verdict, but it is difficult or impossible to tell whether that rule was the basis for the decision. *E.g., Greene v. Morelli Bros.*, 463 F.2d 725, 729 (CA3 1972).

of the law it would be valuable for this Court expressly to hold that *Tennant* limits *Chamberlain* so that *Chamberlain* can no longer be taken to authorize a court to usurp the jury's function by deciding for itself whether the evidence is evenly balanced.

C. The "statistical" technique that the court of appeals invented here is not only unprecedented, but, like the "equal inferences" rule, it fundamentally violates the precept that weighing the evidence is the exclusive prerogative of the jury in the federal system.

Although the use of numbers and statistical techniques gives a superficial appearance of objectivity, the analysis used by the court below is nothing more than another device for the court to reweigh the evidence. There is no way that a court can select numerical values that have an objective relation to the facts of a case; any figures selected for that purpose will be arbitrary figures that merely reflect the court's subjective assessment of the evidence.

Moreover, even if there were an objective way for a court to derive numerical figures without weighing the evidence for itself, such mathematical probabilities have no legitimate role in deciding cases like this one. As this Court has observed, the function of jurors is not to strive for "mathematical certainty," but to apply their cumulative knowledge, wisdom, and common sense to the evidence they are given. *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 526 (1956). The likelihood that one party rather than the other will succeed in persuading a jury to its point of view cannot be a factor in a court's assessment whether the facts rationally would support a verdict for either party. The trial judge may think it highly improbable that the jury will believe a particular witness or accept a particular theory of the evidence, but it is not the judge's prerogative to take the case away from the jury based on that improbability.

Finally, even if probability could be determined objectively and had a legitimate role to play, the court's method of combining the probabilities of two issues in order to determine petitioner's likelihood of prevailing on the entire case is totally invalid, both as a matter of law and under principles of statistics.

The law has always determined the sufficiency of evidence by examining separately the evidence relevant to each issue that is material to the outcome of a case.[22] If the evidence, viewed rationally, could support a verdict on each of the necessary issues, the case is submitted to the jury. If the court believes the evidence to be weaker on some issues than on others, that fact is immaterial; it is the jury's responsibility to decide whether it will find for the plaintiff on one issue or on all. The method used by the court of appeals here would change that principle, requiring a determination of the combined likelihood of winning on all the necessary issues as a prerequisite for submission to the jury. The fallacy of this approach can be seen by considering a case in which the plaintiff must prove a number of discrete elements in order to win. If the number of elements is large enough, multiplying together the probabilities on each issue will make it extremely difficult for any plaintiff to get to a jury. It is just like flipping a coin 10 times; even though the probability of getting heads on each toss is 50%, the probability of getting heads on 10 successive tosses is less than 1 in 1,000. In a case with only four discrete issues, if each one were assigned a probability of 25%, multiplication of the probabilities would yield a product of less than 4 in 1,000—by the court's analysis here, "less than a scintilla."

The court's multiplication of the probability figures in this case is, moreover, contrary to accepted principles

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[22] *See, e.g., Tennant, supra*, 321 U.S. at 32-34; *Gunning v. Cooley*, 281 U.S. 90, 95 (1930); *Voegeli v. Lewis*, 568 F.2d 89, 94 (CA8 1977).

of statistical analysis. Multiplying separate probabilities to obtain a value for the combined probability of two events is proper only when the two events are independent. *See, e.g.*, L. Cohen, The Probable and the Provable 51-52, 61 (1977); W. Hays, Statistics 42-44 (3d ed. 1981).[23] In this case, as in many cases, the issues are not independent, but are linked because they depend to a large extent on the same evidence and the credibility of the same witnesses. The question of Fernandez's knowledge, and the question whether Fernandez would have recommended tenure for plaintiff in the absence of the protected speech, both rested substantially on Fernandez's testimony. Because the jury's view of his credibility would influence the outcome of both issues, they were not independent. *See id.*, at 42-43. Multiplying the probabilities of those two issues, therefore, is statistically improper.

If the court of appeals' decision is allowed to stand, the rule of law applicable in the Fourth Circuit will be in fundamental conflict with the decisions of this Court. The district courts in that circuit, if not elsewhere, will be encouraged by the court of appeals' rules to weigh the evidence for themselves and, based upon their own weighing of the evidence, to remove issues from jury consideration or to set aside verdicts once they are returned. The writ of certiorari should be granted in this case in order to maintain conformity with this Court's decisions and to preserve the meaning of the Seventh Amendment's guarantee of the right to jury trial.

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[23] As the sources cited in the text show, a different formula must be used when the events are not independent. *E.g.*, L. Cohen, The Probable and the Provable 61.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1204

ROBERT J. MAYBERRY,
Appellee,

v.

WILLIAM DEES, *et al.*,
Appellants.

No. 79-1205

ROBERT J. MAYBERRY,
Appellant,

v.

WILLIAM DEES, *et al.*,
Appellees.

November 5, 1982

Appeals from the United States District Court
for the Eastern District of North Carolina

Before HAYNSWORTH, Senior Circuit Judge, HALL
and MURNAGHAN, Circuit Judges.

MURNAGHAN, Circuit Judge:

I.

The Factual Setting

A. *The parties and prior developments.*

East Carolina University (the University) is a constituent institution of the University of North Carolina, and, as such, is a state agency. *MacDonald v. University of North Carolina at Chapel Hill*, 299 N.C. 457, 263 S.E.2d 578 (1980). The University employed Robert J. Mayberry, the holder of a Ph.D. degree,[1] as an assistant professor of romance languages[2] commencing in the fall of 1967. His was a probationary status, the initial appointment being for a period of one year,[3] with successive automatic renewals for one year in the absence of notice of termination given no less than one full academic year prior to the commencement of any school year.[4]

As was the customary approach in the case of full time academic faculty members at the University, it was expected that, during the fifth year in probationary status, i.e., during 1971-72, Mayberry would be considered for tenure. If tenure were granted, Mayberry would achieve essentially permanent status, to last until retirement unless interrupted by his death, incapacity or resignation. If tenure should not be conferred follow-

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[1] Received in 1968, after his initial employment by the University had begun.

[2] During his six years at the University, Mayberry taught Spanish. His doctoral thesis was on a subject of French medieval literature. The question of his qualifications to teach French plays no role in resolution of the issues which confront us.

[3] The academic year, that is, of nine months of service, payable in twelve installments.

[4] For the first two years, shorter periods of time were allowed for the notice of termination (by March 1, 1968 the first year, and by December 15, 1968 the second year).

ing consideration in the fifth year, upon expiration of the sixth year, allowed in compliance with the one-year notice provision, his employment by the University would be without possibility of renewal or extension and would inevitably terminate.[5]

During the fifth year, tenure was not granted to Mayberry.[6] On September 13, 1973, he sued, pursuant to 42 U.S.C. § 1983, claiming that the denial of tenure was retaliatory, to punish him for exercise of protected rights of free expression guaranteed to him by the First Amendment.[7] The defendants included an academic, administrators and governors or trustees.

We have held in a prior opinion, *Mayberry v. Dees*, 638 F.2d 690 (4th Cir. 1981),[8] reheard, and now reconsidered, by a reconstituted panel, that no defendant, save Dr. Joseph F. Fernandez, was liable, officially or individually, because of Eleventh Amendment immunity, on the one hand, and because of the defense of good faith immunity, on the other.[9] For the additional considerations which we here elaborate, we approve those holdings of

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[5] In the district court, it was contended that Mayberry had tenured status, because of his appointment for the sixth year, but a partial summary judgment was entered that there was no automatic conferral of tenure where Mayberry had specifically been denied tenure before expiration of his probationary period. That decision was evidently correct and the claim does not appear to have been pursued on appeal.

[6] By letter of April 20, 1972, the University president informed Mayberry that he would not be granted tenure, nor employed beyond the 1972-73 academic year.

[7] The complaint also raised due process and equal protection claims, but they are not pursued in the appeal. *See Clark v. Whiting*, 607 F.2d 634 (4th Cir. 1979).

[8] The opinion, having been withdrawn because of the grant of rehearing, appears only in the advance sheets, not in the final published volume.

[9] We did conclude that Mayberry was entitled to reinstatement.

non-liability.[10] Moreover, we have decided that the judgment in favor of Mayberry, against Fernandez, should be reversed, the claim of retaliation as punishment for First Amendment exercise not having been established. The reasons applicable to the case of Fernandez apply *a fortiori* to all other defendants. In view of those conclusions, there is no basis for granting reinstatement. The district court had denied relief of that nature, and we now affirm that aspect of the decision.

B. *The operative facts.*

1. *Mayberry's tenure prospects before exercise by him of the protected speech.*

The actual course of Mayberry's career at the University, insofar as the record discloses, progressed, if not altogether without incident, still essentially quietly until sometime in the fall or winter of the 1971-72 academic year (the fifth year of employment, and, consequently, the year in which Mayberry was to be considered for tenure).

Nevertheless, the record compiled by Mayberry anterior to the asserted violation of his First Amendment rights did not justify a conclusion that, with a large measure of probability (let alone certainty), he would, during the critical fifth year, be recommended for tenure.[11] It was during that fifth year, 1971-72, that the utterances for

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[10] Furthermore, the plaintiff has dismissed the claims made against the following defendants in their individual capacities: William Dees, Chairman of the Board of Governors, University of North Carolina, William Friday, President, University of North Carolina, and Robert Morgan, Chairman, Board of Trustees, East Carolina University.

[11] *Contrast Selzer v. Fleisher*, 629 F.2d 809, 810 (2d Cir. 1980), *appeal pending* ("Selzer had been enthusiastically recommended by the appropriate committees in the political science department and the School of Social Science for promotion from Assistant to Associate Professor in the Spring of 1976.").

which Mayberry has claimed First Amendment protection against retaliation were made.

As early as July 16, 1970, well before there existed any basis for claiming retaliation as punishment for free speech exercise, Fernandez, the chairman of the romance languages department, in the Annual Evaluation for Mayberry, prepared as part of the regular practice,[12] expressed "doubts about tenure," pointing out that he "[c]ontinues to conduct classes in English" "and refuses to follow" "my views concerning use of the language [Spanish] in class," being "so opposed to *my* objectives for the Department." He further observed that Mayberry was "given to complaining" and "not willing to compromise." There was evidence, independent of the Annual Evaluations, that Mayberry insisted that it should be done Mayberry's way, not the Department's way, insofar as instruction through the medium of English rather than Spanish was concerned.[13]

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[12] The Annual Evaluations were admitted in evidence, not for their truth, but as indications of Fernandez' motive. That motive is what the case is all about, and, in referring to the contents of the Annual Evaluations, we observe the same restrictions, with respect to them as obtained at trial.

[13] At some time before March 26, 1970, there had surfaced a basic professional difference of opinion between Mayberry and Fernandez over whether upper level romance language courses should be conducted in the language of instruction (here Spanish), a common university practice. Mayberry, although apparently making concessions to the necessities of the situation, still as late as June 1972 was continuing to insist that his "refusal to teach literature courses in the language" fell within his academic freedom rights. Anyone contemplating tenure for Mayberry would hardly fail to anticipate that, with the resulting permanence of employment, and consequent independence, attendant upon a grant of tenure, he would go his own way, in contradiction of department policy. *Cf. Hetrick v. Martin*, 480 F.2d 705, 709 (6th Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973) ("We do not accept plaintiff's assertion that the school administration abridged her First Amendment rights when it refused to rehire her because it considered her teaching philosophy to be incompatible with the pedagogical

Another faculty member's 1970 Annual Evaluation stated:

> I suspect that if there is a conflict between departmental program and personal desires, however, he will opt for personal desires. He is adolescent in his insistence on "my personal freedom. . . ." He is, however, lazy.

That academic evaluator concluded that he would recommend tenure only as a means of keeping the services of *Mrs.* Mayberry for the department.

The November 1971 Annual Evaluations are mixed.[14] One stated:

> [D]oes not give impression that he works very enthusiastically or derives great satisfaction from teaching. . . . Potential probably limited, especially until he gains greater conviction concerning teaching pro-

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aims of the University. Whatever may be the ultimate scope of the amorphous 'academic freedom' guaranteed to our Nation's teachers and students, . . . it does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession.").

It is only a by-the-way, but contrast Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 Ga. L. Rev. 605 (1981):

> When I reported for duty in New Haven, Dean Wesley Sturges said to me: "You will teach Sales." I said: "Yes, sir." That is how I became a commercial lawyer. I do not know how such matters are handled today.

[14] Plaintiff only proved that he commenced the free speech exercise on which his case depends some time in the fall of 1971-72, shortly after October 19, 1971. It is a small point, the Annual Evaluation comments critical of Mayberry being only cumulative, and the praiseworthy statements being well before the April 1972 decision as to tenure in any event. Still, it was Mayberry's burden, as plaintiff, to prove dates to the extent they would or might be relevant or decisive.

> fession. . . He lacks a kind of strength that would make me recommend him for tenure with confidence that I was getting the best man possible for the position.

There were also evaluations in November, 1971, that recommended tenure for Mayberry.

Fernandez, in a May 26, 1971 Evaluation, unquestionably before the fall and winter 1971 utterances for which First Amendment protection is claimed, noted that Mayberry "now says he agrees with my objectives," and concluded: "If reduction in staff is forced upon us, would hesitate to give him tenure. Otherwise, would not object."

Under the administrative procedures of the University, Fernandez, as chairman of the department of romance languages, was delegated the responsibility, after consultation with other faculty members of the department, and the dean, as he deemed appropriate or possible, of forming, and forwarding, through the dean, to the University provost, a recommendation as to whether tenure should, or should not be granted.[15] Responsibility for the final decision reposed in the chancellor, but, as a practical matter, it was unlikely that tenure would be granted in the face of a negative recommendation from the department chairman. *Cf. Clark v. Whiting*, 607 F.2d 634, 637 (4th Cir. 1979).

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[15] The University Faculty Manual stated: "The decision regarding retention of a non-tenured faculty member will be made by the Department Chairman after such consultation with members of the faculty and the Dean of the College or School as he shall deem appropriate in each case."

While others on the romance language department faculty were divided as to whether they should recommend Mayberry for tenure, their views have a very diminished consequence for our purposes (except as they show that negative impressions of Mayberry were not solely confined to Fernandez). At the University, the department chairmen principally called the shots, and it was thus what Fernandez would recommend that counted.

2. *Circumstances leading up to Mayberry's exercise of free speech and free press.*

In the fall of 1971, the University was looking ahead to an upcoming decennial reaccreditation, a matter of considerable importance to an educational institution. Loss of accreditation would call into question the capability of the University to perform creditably its educational mission. Lacking accreditation, it would find its ability to attract competent teachers and qualified students substantially diminished.

The University established a Self Study Steering Committee to consider the necessary steps to put it in the best posture for insuring successful reaccreditation. The Committee functioned university-wide, and the department of romance languages also set up, to study aspects of the reaccreditation of particular relevance and importance to the department itself, an Organization and Administration Committee. Fernandez, as department chairman, had the responsibility for the formation and the composition of the Organization and Administration Committee. It consisted of four members, one being Fernandez, himself, as chairman. Another member was Mrs. Fernandez, who also was a tenured member of the department.

3. *Free speech and free press exercise by Mayberry in the fall and winter of 1971-72.*

Mayberry perceived Fernandez' self-appointment as stifling. In the fall of 1971, he went door-to-door to his colleagues in the department of romance languages and complained about the composition of the Organization and Administration Committee, asserting that it would preclude their feeling free to speak out about departmental problems perceived by them. He suggested that Fernandez should be disqualified to serve as a member of the departmental Organization and Administration Committee.[16]

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[16] A member of the department in Mayberry's probationary position had no basis, absent well-substantiated grounds which

The word of mouth complaints of Mayberry against Fernandez were committed to writing in an anonymous letter to the University-wide Self Study Steering Com-

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would render the department chairman unable to act objectively and free from vindictiveness, for seeking to disqualify the department chairman. Mayberry advances considerations of supposed personal antipathy between him and Fernandez, but the grounds advanced were far too slight to justify a Court's accepting that it should interfere in such circumstances to approve, much less bring about elimination of the man who was head of the department. *See Duke v. North Texas State University*, 469 F.2d 829, 838 (5th Cir. 1972).

The chairman, at the apex of the departmental hierarchy, was a virtually indispensable Organization and Administration Committee member, so the charge by Mayberry that his service would be improper practically amounted to a demand for the removal of Fernandez from the chairmanship of the department, or, at least, his emasculation in that role. Such an extreme remedy, in the interests of regularity and efficiency of administration, should be proposed to the dean, the chancellor, the provost, or the president, each of whom was a superior of Fernandez and, consequently, in a position to act on the recommendation of removal if it proved to be justified. Yet Mayberry never approached any of those University officials, although the University Faculty Manual gave him the authority to do so. There was an air of irresponsibility in "Down with the Boss" exhortations made to co-workers, to other members of the department, all serving at levels beneath the department head and unable, singly or collectively, to bring about Fernandez' removal. Judge Dupree, who presided at the trial, in dealing with post-verdict matters, concluded that, as an established fact, "the evidence reflected an insubordinate dimension to his [Mayberry's] protected criticism." *Cf. Roseman v. Indiana University of Pennsylvania, at Indiana*, 520 F.2d 1364, 1368 (3d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976), where the court, in affirming a finding for the university and stating that the teacher's critical remarks were not entitled to First Amendment protection, observed that "Roseman's [attacks] called into question the integrity of the person immediately in charge of running a department . . . [and] would undoubtedly have the effect of interfering with harmonious relationships with plaintiff's superiors and coworkers." *See Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); *cf. Bradford v. Tarrant County Junior College District*, 492 F.2d 133, 135 (5th Cir. 1974).

Hence, giving the strongest intendment to the plaintiff's side of the case, it must be assumed that the gravamen of Mayberry's

mittee. The letter was written by Mayberry's wife. Mayberry assisted in its preparation. Mayberry explained, and the jury was entitled to credit the explanation, that

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complaint was a suggested stacking of the committee through the addition of Mrs. Fernandez, which arguably, if the husband and wife were to engage in block voting, would allow them to prevent anything they did not want, and assure them a very strong position for maneuvering to get anything they did want.

If that was what was troubling Mayberry, he was in a vulnerable position to make the by-no-means trivial accusation that Dr. Fernandez and Mrs. Fernandez, by reason of their personal association, were unable to act impartially and professionally. Dr. Mayberry's wife was also a teacher at the University, likewise a member of the romance language department, whose consideration for tenure, even as that of her husband, was coming up in the 1971-72 academic year. Mrs. Mayberry was linked with Dr. Mayberry in firing one of the early shots against Fernandez in the intradepartmental fuss.

The hiring of qualified women who are wives of faculty members is a developing consequence of society's belated efforts to eradicate the stigma of second-class status for women. To lessen the likelihood of charges of spousal bias, it doubtless is preferable to work it out, where possible, so that one of the two spouses works at another, nearby institution, or at least in a different department of the university. But nothing in the record here suggests the availability of appropriate employment at another institution in the vicinity. Nothing suggests that chemistry majors will not be drawn, in selecting marriage partners, to chemistry majors, and romance language specialists to romance language specialists. So it was with Dr. and Mrs. Mayberry, and Dr. and Mrs. Fernandez. Neither Dr. Mayberry nor Dr. Fernandez was in a position to complain that the wife of the other was employed by the University. Dr. Fernandez made no such complaint, for he recommended a grant of tenure to Mrs. Mayberry, which, in 1972, was offered and accepted.

When the University thus hired qualified women, it could hardly be faulted for extending to them the full rights associated with the positions they filled, including eligibility to serve on such a body as the Organization and Administration Committee. A mere hypothetical generalization that husbands and wives will always be inclined to be biased should not be allowed, in the absence of specific proof, to perpetuate the second-class exclusionary treatment to which women have, for far too long, been subjected. The record evinces no such particularised proof.

the letter was anonymous because of an understanding on his part, and on the part of Mrs. Mayberry, that it should be unsigned. The fact of anonymity, nevertheless, served substantially to reduce the possibility that, before April 13, 1972,[17] Fernandez had learned the identity of the source of the complaint against him.

Mayberry, in January or February, 1972, had completed, and filed with the Self Study Steering Committee, an unsigned questionnaire highly critical of Fernandez. Fernandez flatly denied that he knew that Mayberry had submitted the questionnaire, let alone that it was critical of him, until after April 13, 1972. Nothing in the evidence went to establish the contrary.

4. *Extent of Fernandez' awareness, prior to April 13, 1972, that Mayberry had been critical of him.*

Those were the facts as to (a) Mayberry's prospects for achieving tenure, assuming no interjection of retaliation for free speech exercise, and as to (b) the free speech on Mayberry's part which he claims led to retaliation. An obvious essential ingredient for the making out of his case is proof that Fernandez, before April 13, 1972, knew *both* that he was being criticized *and* that the criticisms emanated from Mayberry. "As a non-tenured employee, he [a university professor] had the burden of proof." *Megill v. Board of Regents of the State of Florida*, 541 F.2d 1073, 1078 (5th Cir. 1976); *Johnson v. Cain*, 430 F. Supp. 518, 520 (N.D. Ala. 1977) ("However, the burden of proof rests with the plaintiff to show that his dismissal was due to statements or other conduct protected by first or fourteenth amendment freedoms.").

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[17] April 20, 1972 was the date on which Mayberry was informed that he would not receive a grant of tenure. Fernandez' recommendation to that effect was made to the provost on April 13, 1972.

The most that Mayberry, as plaintiff with the burden of proof, could produce as evidence as to any knowledge by Fernandez on or before April 13, 1972 of Mayberry's criticisms directed at him was:

1. Shortly before the tenure decision, in the Spring of 1972, Dr. Thomas Andrew Williams, a professor of French, recommended Mayberry for tenure. Fernandez responded that it was out of the question because Mayberry was a troublemaker. The statement was not elaborated or explained. There was no showing that it referred to speech or other form of protected expression—in particular, no showing that it related to Mayberry's criticisms.[18]

2. Mrs. Mayberry testified that, in a departmental meeting, Fernandez stated that he had been told that there was some unrest in the department concerning how the Operations and Administration Committee had been set up. There was no testimony, however, that Fernandez knew who was restive.

3. The Court asked Fernandez whether any information that Mayberry had been critical of him came to his attention before his decision concerning Mayberry's tenure. The answer was "Possibly yes," followed with the explanation:

> I did not know when the Judge questioned me as to whether I had possibly heard anything about criticism before—I was referring to the fact that—I mean when you hear comments—how would I know if I did not hear any before April 15th. Maybe I did,

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[18] There were previous activities of Mayberry meriting description of him as a troublemaker, especially his insistence on teaching in English, rather than Spanish, despite a departmental policy to the contrary. The constitutional right to criticize a faculty colleague is the fundament of Mayberry's cause of action. He appears to wish to obliterate the right of the faculty chairman to criticize a subordinate, while exalting the right of the subordinate to criticize the chairman.

but what I heard was just something that Mayberry was not very happy with my performance, but neither was Nancy Mayberry. She could have been more critical—neither was Lucy Wright—neither was John Costa. I do not think there is a Department in the world where everybody is happy with their Chairman. I never heard anything about this Self-Study about which there has been so much ado until after the tenure decision.

5. *University requirement that staff reduction in the romance language department take place.*

On the other hand, Fernandez explained in his letter of April 13, 1972 to the Provost, and orally to Mayberry the same afternoon, that he was not recommending tenure for Mayberry because of a need to reduce the number of faculty members proficient in Spanish, due to slackened demand in that area.[19]

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[19] For a period of several years after April 20, 1972, it was, in fact, the case that the number of romance department faculty members remained reduced. The statistics fully substantiated the claim of lessened Spanish enrollments in years preceding the 1971-72 term. It is an inescapable conclusion that the provost had indicated to the dean and to Fernandez as department chairman that the department was overstaffed and had to be reduced. Fernandez understood that not all five romance language professors in their crucial tenure consideration year could be granted tenure. The other four made it. Mayberry was the low man on the totem pole and did not.

No one has ever seriously suggested that considerations of whether to grant tenure may not include need for the teacher, and whether there will be sufficient work to keep him busy. That is but another example that not everyone satisfying the requisite qualifications will necessarily be granted tenure. "Many are called, but few are chosen." American universities are replete with distinguished full professors who, when the time came at their first university, went "out" and not "up." It is not in any sense denigrating when a university concludes, at the moment of decision, that its best educational interests will not be served by a conferral of tenure, however capable and collegial the candidate may be. See n.29 *infra*.

II.

The Legal Consequences

A. *Impact of the Need to Reduce Staff*

It is our conclusion that, resolving all doubts in plaintiff's favor, and fully accepting that his remarks were entitled to First Amendment protection,[20] nevertheless he did not present a sufficient case to justify his going to a jury. First and foremost, long before Mayberry uttered any of the criticisms on which he has based his case, the department head, Fernandez, had already concluded that he would not recommend tenure if the department had to undergo any staff reduction. Fernandez, in reviewing the five candidates eligible for tenure consideration in 1971-72, knew that one had to be denied tenure, i.e., that staff reduction was required.[21]

B. *Weakness of proof of awareness by Fernandez that Mayberry was the source of the criticism.*

Second, the evidence was very weak that Fernandez, before April 13, 1972, knew Mayberry was the source of the criticisms. At most it comes down to the fact that Fernandez testified that he "possibly knew." Mayberry, however, as the plaintiff, had the burden of persuasion. A statement that one possibly knew implies that he possibly did not know, leaving things very close to an even balance. Chief Judge Sobeloff put it well when he observed that an issue can only be submitted to the jury

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[20] See, however, *Shaw v. Board of Trustees of Frederick Community College*, 549 F.2d 929, 932 (4th Cir. 1976); *Chitwood v. Feaster*, 468 F.2d 359 (4th Cir. 1972); *Williams v. Day*, 412 F. Supp. 336, 340 n.1 (E.D. Ark. 1976), *aff'd*, 553 F.2d 1160 (8th Cir. 1977).

[21] Mayberry seeks to aggregate apples and oranges in pointing to others at or about the same time hired by the department. Non-tenured, probationary teachers who can be terminated on notice of a year or less are simply not comparable to essentially permanent tenured professors.

when it is supported by "[e]vidence which shows a 'probability' and not a mere 'possibility.' " *Ralston Purina Co. v. Edmunds*, 241 F.2d 164, 168 (4th Cir. 1957), *cert. denied*, 353 U.S. 974 (1957); *accord Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958), *cert. denied*, 358 U.S. 908 (1958); *Bryan v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 565 F.2d 276, 281-82 (4th Cir. 1977), *cert. denied*, 435 U.S. 943 (1978).

C. *Insufficiency of June, 1972 events to prove causality with respect to April, 1972 recommendation that tenure not be granted.*

Plaintiff seeks to make much of the fact that, in early June, 1972, Dr. Mayberry and Mrs. Mayberry met separately with Fernandez. Each quoted him as accusing Mayberry of being a troublemaker in his critical observations about Fernandez to the Self Study Steering Committee, thereby stirring up trouble. He was quoted as adding that further adverse conduct by Mayberry would result in his immediate termination. Dr. Williams, the French Professor, quoted remarks to like effect made by Fernandez at the time in June, 1972 when Williams suggested reconsideration of the decision not to offer tenure to Mayberry. Fernandez stated to Williams that he would not have someone like that tenured in the department. Fernandez' demeanor at the June meetings was described as angry.

Mayberry would relate those occurrences back two months or more to the period prior to April 13, 1972 on a theory that Fernandez had been harboring hard feelings all that time. It is, however, simply too thin, considering the evidence as a whole. The June anger, in the circumstances, is much more probative of contemporary identification of the critic at a time well after the tenure decision had been reached.

D. *Legal irrelevance of fact that two granted tenure did not have Ph.D. degrees.*

There is another fact which should be mentioned in this connection. At the time Fernandez declined to recommend tenure for Mayberry, he gave favorable consideration to 4 other candidates, among them Mrs. Mayberry.[22] Of the 4 granted tenure, 2 (Mrs. Mayberry included) had earned the Ph.D.; 2 had not. Mayberry had since 1968 been a Ph.D., and the University normally required a Ph.D. for a grant of tenure, although waivers of that requirement had, with some frequency, previously occurred.

No great weight can, with respect to a First Amendment violation claim, be assigned to the fact that several candidates to whom tenure was granted in 1971-72 lacked the Ph.D. degree, while Mayberry had been a doctor of philosophy since 1968. The doctorate or lack thereof theoretically could make a difference "all other things being equal." But things, when teaching qualifications are being examined at the university level, are practically never equal. Human personalities come in myriad forms, capabilities and sizes, and, in determining whether or not to grant tenure, it is appropriate not to

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[22] The jury was not required to give weight favoring Fernandez to his treatment of Mrs. Mayberry. Nevertheless, it does attenuate Mayberry's theory of recovery, for it is unlikely in the extreme to think that, knowing the joint participation by the Mayberrys in the criticisms, Fernandez would treat them differently. It suggests, rather, that he did not have the knowledge on April 13, 1972. Deriving from the evidence a conclusion that retaliation was Fernandez' motive is rendered practically impossible by the consideration that, if Fernandez wanted, for unjustified reasons of personal animus, to get rid of Mayberry, it would have been inconsistent not to have treated Mrs. Mayberry in the same fashion. Fernandez, if he was ruthlessly retaliating, presumably would have wanted to promote and orchestrate a departure from his vicinity of Mayberry. Yet to facilitate permanent employment by the University of Mrs. Mayberry, as Fernandez did through the recommendation of her for tenure, tended to the exactly opposite result.

accord controlling weight to any single indicator. The doctoral degree is but one of a number of factors to be considered when the question of whether to grant tenure is addressed. Its presence by no means guarantees a grant of tenure. Its absence by no means prevents a grant.

There consequently must be something more than proof of Mayberry's Ph.D., and the lack of that academic merit badge on the part of another, successful candidate.

E. *Non-recusal of Fernandez with regard to the tenure recommendation respecting Mayberry.*

No more does it advance Mayberry's case to point to the fact that Fernandez, who became his adversary, by virtue of his recommendation to deny tenure, did not recuse himself. It will not suit to fashion a rule, or reach a result which, in its consequences, will expose universities to great turmoil and expense, unless they automatically rearrange the departmental structure to remove the department chairman or other evaluating faculty members from further participation as to a particular candidate for tenure everytime sparks fly. *See Megill v. Board of Regents of the State of Florida*, 541 F.2d 1073, 1079 (5th Cir. 1976). The inordinate increase in cost and the elimination of effectiveness which manifestly would attend any such rule are all too evident. Such a rule would be an open invitation to manipulative activities by a candidate to neutralize consideration by a department chairman who the candidate had cause to believe did not, for adequate reasons, favor a grant of tenure.

The evidence must, therefore, be substantial that the senior faculty member participating in the evaluation process of a candidate for tenure has so lost his objectivity that he no longer is able to look on the task from the university's perspective, but instead has personalized it and converted it into something approaching a per-

sonal vendetta. *Duke v. North Texas State University*, 469 F.2d 829, 834 (5th Cir. 1972).

F. *Absence of sufficient causal connection between Mayberry's criticisms and Fernandez' recommendation not to grant tenure.*

The law is a study and function of human life, not an exercise of automatons. It is, consequently, an aggregate of approximations, not an exact science. So a resort to percentages to demonstrate a point is only to provide an illustration, not to suggest that sufficiency of the evidence can be reduced to such mathematical precision.

With that *caveat* in mind, let us suppose that for either of the two factors in the equation, standing alone, there was sufficient evidence to have supported a jury verdict in Mayberry's favor. The two factors are, of course, (a) a favorable prospect, before his protected criticism was uttered, of Mayberry's receiving tenure, and (b) some degree of assurance with which it could be said that Fernandez knew of the criticisms as originating with Mayberry before he, on April 13, 1972, submitted his recommendation that Mayberry not be granted tenure. The evidence favoring Mayberry on either factor, standing alone, while weak, still, we may assume, would have sufficed for a jury verdict in Mayberry's favor. Let us, as best we may, recognizing that we thereby substitute an apparent simplicity for an actual complexity, assign values of 5% and 8% likelihood respectively. If one of them had been at the virtual certainty level,[25] the case

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[25] *Cf.* the *Selzer* case cited in note 11 *supra*. *See Gieringer v. Center School District No. 58*, 477 F.2d 1164 (8th Cir. 1973), *cert. denied*, 414 U.S. 832 (1973) (teacher got on well professionally with his superiors, receiving satisfactory or better ratings. "The sole exception arose out of an impromptu report delivered by Geiringer at a meeting of the . . . teachers' association. . . . The subject of this report related to the school district's financial ability to raise teachers' salaries."); *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966, *en banc*), *cert. denied*, 385 U.S. 1003 (1967); *Guerra v. Roma Independent School District*, 444 F. Supp. 812

would hold at the 5% to 8% range of probability. But both were far from the virtual certainty level, and multiplication of the two, one against the other, yields a figure of less than .005. That is, the causality percentage of the case, for which Mayberry, as plaintiff, had the burden of proof was but 4/10ths of 1%. Put another way, it is 99.6% certain that denial of tenure was not associated with the protected criticism. In the real, everyday world, the residual 4/10s of 1% is less than a scintilla, and the case falls for failure of proof.

Against the strong probability that tenure would not be forthcoming for Mayberry, the evidence that Fernandez retaliated for reasons of free speech exercise is just too attenuated, especially evidence of the essential causal link, namely, knowledge by Fernandez by April 13, 1972 that Mayberry was the source of remarks critical of him. *See Chambliss v. Foote*, 421 F. Supp. 12, 15 (E.D. La. 1976) ("The evidence does not support a finding of any causal connection between the statements made or demonstrative activities engaged in by the plaintiff or her husband and the non-renewal of her contract."), *aff'd on basis of the district court's opinion*, 562 F.2d 1015 (5th Cir. 1977), *cert. denied*, 439 U.S. 839 (1978); *Markwell v. Culwell*, 515 F.2d 1258 (5th Cir. 1975).

All in all, therefore, both obstacles in Mayberry's path, combined, have proven too much for him to overcome, even assuming that, had but one of them existed, his evidence would have been sufficient to surmount it.

(S.D. Tex. 1977) ("All four teachers in question were praised by their supervisors; both their principal and their superintendent recommended that their three year contracts be renewed. No dissent from these evaluations or recommendations came in evidence. . . . they were penalized for their political associations. . . ."); *Johnson v. Butler*, 433 F. Supp. 531 (W.D. Va. 1977). As to the other prong of the case, suppose that Mayberry had signed the anonymous critical letter and posted it directly to Fernandez.

G. *The nature of a tenure grant at the university level, and the absence of stigma in a failure to receive tenure.*

To counter that reduction of the plaintiff's case to or below the *de minimis* level, Mayberry can point to something which he may argue augments the figures to his favor, enhancing the likelihood that he would have been granted tenure, were it not for the criticism. In his fifth continuous year at the University, he could call attention to four occasions (indeed to five, counting the final year allowed in order to comply with the rule requiring 12 months' advance notice of non-reappointment) when his work was deemed so satisfactory that the University renewed his teaching contract. That, Mayberry can contend, raised his probability of receiving tenure to a virtual certainty, there having been no evidence of any prior effort to terminate him, but, on the contrary, a reiterated expression of satisfaction with his work.

There is some immediate surface plausibility to the argument, but it dissipates entirely following a review of just what appointment, at a university level, to tenured status signifies—and, even more to the point, what non-appointment does not signify.

There appears to lurk in some quarters a belief that the jury would have been within its rights to infer from five years of continuous service by Mayberry, satisfactory enough to merit repeated yearly reappointment for yet another year, that some unworthy reason must have underlain his failure to win tenure, and that negative reaction to his unfavorable criticism was, indeed, the occasion of unmerited mistreatment. Such a suspicion is no more than that, unsupported by evidence, and at complete odds with the concept of tenure as it exists in American institutions of higher learning.

To address that point will necessitate a rather detailed description of the tenure concept. The rules gov-

erning teacher employment status at institutions of higher learning such as the University, as is customarily the case throughout the United States, derive primarily from generally applicable, nationwide principles. While professors and instructors, on the one hand, and individual institutions, on the other, may make overriding agreements which will, naturally, take precedence, they are not usual. In the case of the University and Mayberry, rather than any inconsistent, specialized terms controlling, the University Faculty Manual, to the extent here relevant, coincides with or supplements the generality.

As an authoritative source for the applicable rules we turn to *Faculty Tenure, A Report and Recommendations by the Commission on Academic Tenure in Higher Education*, 1973 (hereafter "Faculty Tenure"). As stated in the Preface to that book:

> The Commission on Academic Tenure in Higher Education was established during 1971 and worked under a grant from the Ford Foundation. The commission was jointly sponsored by the Association of American Colleges (AAC) and the American Association of University Professors (AAUP), two organizations with a long history of joint activity in the development of policies relating to higher education. In particular, the AAC and the AAUP were the framers of the 1940 Statement of Principles on Academic Freedom and Tenure, the fundamental document on the subject. The 1940 statement was a restatement and expansion of the 1925 Statement on Academic Freedom and Tenure, prepared by a conference of educational organizations, including the AAC and the AAUP, convened by the American Council on Education. The 1925 statement in turn, had replaced the original 1915 Declaration of Principles drawn up by the Committee on Academic Freedom and Tenure of the AAUP and endorsed by that association in 1915-1916.

> By 1970, the 1940 Statement of Principles on Academic Freedom and Tenure had been officially endorsed by eighty-one professional organizations. It had been incorporated, explicitly or by reference, in detail or in principle, in the policies of most of the institutions of higher education in the United States . . . .
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> . . .
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> In 1971 the AAC and the AAUP created the Commission on Academic Tenure as a separate, autonomous unit. It was to design and carry out its own program of investigation and make its report directly to the academic community and the general public, without reference to the sponsors. This agreement was expressly understood by all members of the commission and has been scrupulously observed. *Faculty Tenure*, therefore, presents the views of the Commission and not those of the AAC or the AAUP or the Ford Foundation.

From *Faculty Tenure*, the following picture evolves, both from an historical point of view, and as things are now:

1. After a varied history of ups and downs, the status of university teachers had sunk to where, by the latter days of the Nineteenth Century, everyone served at the will of the university administrators. Practically no one had formal assurance of continued employment. *See Faculty Tenure*, 122-23, 127-28, 135.

2. In 1900, an egregious endeavor by a most substantial financial backer and sole trustee of a distinguished institution, Stanford University, to bring about the dismissal of an established professor because the financial backer disliked his professional views, served as a catalytic agent toward the development of do's and don'ts regarding dismissal of established university professors. *Id.* 137-42. The major initial objective was pro-

tection of academic freedom, the elimination of thought control, and the outlawing of punishment for "unacceptable" ideas. *Id.* 137, 143-44.

3. There has evolved the concept of tenure, a conferral of status on proven scholars which, absent considerations not directly involved in the present case (namely, demonstrated incompetence, moral turpitude, financial exigency or program elimination) insures permanent employment from the time of grant of tenure until the reaching of retirement age.

4. The status of tenure, effectively precluding, as it inevitably does, for possibly a very long time, the replacement of a less good teacher by a better one, is recognized as carrying with it a duty that great care be exercised in its conferral.[24] Only scholars of proven distinction are deemed to merit tenure. *Id.* x, 59:

> In the real world, a probationary period is necessary, and tenured status must rest upon explicit judgment.
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> . . . *The commission recommends that the award of tenure always be based on an explicit judgment of qualifications, resulting from continuous evaluation of the faculty member during the probationary period, in the light of the institution's stated criteria.*

(Emphasis in original.) Demonstration of factors well beyond the mere passage of time in service,[25] namely

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[24] Byse, *Academic Freedom, Tenure and the Law: A Comment on Worzella v. Board of Regents*, 73 Harv. L. Rev. 304, 305 n.4 (1959):

> It must be recognized that tenure can become an instrument to perpetuate incompetence and mediocrity rather than to advance scholarship and talent. But the fact that tenure can be debased does not mean that it is less valuable. It means only that other processes must not be neglected—including careful selection of those to whom tenure is awarded.

[25] *Id.*, *"The commission urges that tenure never be acquired by default, through the mere passage of time in probationary service."* (Emphasis in original.)

(a) creditable scholarship, (b) accomplished pedagogy, (c) able service to the university in matters associated with its maintenance, operation, growth and continued endurance, and (d) developed collegiality—the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests[26]—is required by the university, and should be established before a candidate is granted tenure.

Faculty members in universities in general who had proven their own worth appreciated the possibility of pollution of the academic atmosphere, in which their own lives were conducted, through indiscriminate admission of insufficiently tested candidates who might prove to be unproductive, uncollegial, or both.[27]

5. Out of that requirement of demonstration by the would-be tenured teacher of important developing qualifications and qualities,[28] has arisen the concept of probationary status customarily accorded to beginning teachers.[29] Usually, at the outset, employment is for a

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[26] In the words of the University Faculty Manual, a factor to be considered in evaluating salary increases and promotion in rank (including conferral of tenure) is "constructive relationship with colleagues." *See Watts v. Board of Curators, University of Missouri*, 363 F. Supp. 883, 890 (W.D. Mo. 1973), *aff'd*, 495 F.2d 384 (8th Cir. 1974) ("It was proper in reaching a judgment of suitability for a permanent position in a faculty to consider whether or not Plaintiff was a good colleague to other members of the faculty."). *See Duke v. North Texas State University*, 469 F.2d 829, 838, 840, 841 (5th Cir. 1972); *Faculty Tenure*, 190.

[27] *Faculty Tenure*, 150; 190:

> The probationary faculty member must convince his colleagues and administration by his performance and continued promise that he merits tenure; any doubts must usually be resolved against him.

[28] *Id.* 62.

[29] *Faculty Tenure*, 119:

> Much later, a time limit on temporary service would be seen as serving another function—of providing a period of probation

single year, though regularly the requirement of prior notice (here a year) of non-reappointment extends duration of the service period by the length of the required period of notice. Such employments in probationary status were dealt with in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), which held that they created no expectation of continued employment or other property interest and no right to a hearing.

Faculty Tenure emphasizes that the probationary status should not be too short,[20] and sets as a desirable

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in which the novice would gain the benefit of an internship and the institution the benefit of a second look before making a permanent commitment.

Today, the probationary period is universal. *Faculty Tenure*, 257 defines it as

> a period of professional service during which a faculty member on *term appointment* does not hold tenure and is observed by his colleagues for the purpose of evaluating his professional qualifications. At the end of this period, the faculty member either receives *academic tenure* or is not reappointed.

(Emphasis in original.) It should be constantly borne in mind that

> A dismissal proceeding is different from a tenure-review process. Specifically, in a dismissal proceeding, the institution brings charges against a faculty member (charges such as inadequate performance of duties, incompetence, or misconduct) with the clear design of ridding itself of an undesirable employee. . . . A tenure review, in contrast, is concerned with whether or not to grant tenure in light of the departmental or academic program needs, prevailing economic and budget considerations, the qualities of the particular candidate, and the existing job market. Tenure review obviously never applies to a person who already has tenure, whereas a dismissal proceeding could. Theoretically, separation from an institution because tenure was not granted carries no professional stigma; dismissal for cause clearly does. . . .

Id. 197.

[20] *Id.* 65:

> *The Commission recommends retention of the seven-year period as the maximum for probationary service, and recommends that*

maximum seven years of employment in that category (six years of probationary status, with the decision on tenure in the sixth year, and, absent a grant of tenure, one terminal year, with no hope for tenure and no possibility of further reappointment). *Id.* 61 ("Allowing for a full year's notice in the event of an unfavorable decision, this means an effective probationary period of six years . . . .").[21]

It is a fact of basic importance that *non-renewal*, following the running of the established probationary period, is not a *dismissal*, and is altogether lacking in invidious connotations.[22] There are numerous factors apart from the probationer's level of competence entering into the decision whether to confer tenure—the *sine qua non* for remaining in a university's employ after expiration of the probationary period. It is not a criticism to be denied tenure.[23]

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institutions, as a matter of policy, use probationary periods of not less than five years.
(Emphasis in original.)

[21] *Cf.* the generally accepted 1940 Statement of Principles on Academic Freedom and Tenure (*Faculty Tenure*, 249 ff):

> . . . the probationary period should not exceed seven years. . . . Notice should be given at least one year prior to the expiration of the probationary period. . . .

[22] *Id.* 153:

> Not everything in the 1940 Statement [of Principles on Academic Freedom and Tenure, jointly issued by the AAUP and the AAC] went to shoring up security. Considerable attention was paid to competing values—institutional flexibility, quality control. Thus, it reaffirmed the proposition that tenure alone conferred judicial citizenship and that probationers could be let go at the expiration of a term appointment, provided due notice had been sent.

Dr. Mayberry, of course, received the requisite notice of non-renewal. *See* n.6, *supra*.

[23] *Id.* 69:

> It is essential that institutions, faculty, student, and the general public understand the important distinction between *dis-*

The University's system with which we here deal did not extend its probationary status period to the outside maximum allowable under what *Faculty Tenure* has reported to be the customary guideline. Nor did it shorten it to less than the recommended minimum. The University called for the tenure decision in the fifth year, one year earlier than the maximum allowed and the very minimum suggested in *Faculty Tenure*, with a terminal sixth year. In higher education generally, a period of probationary status greater than six years (plus one notice year) would be frowned on, and anything longer than that is apt to be deemed to have operated to create actual or *de facto* tenure. *Perry v. Sindermann*, 408 U.S. 593 (1972).

Obviously, at some point, the teacher is entitled to a decision, and cannot be kept dangling too long. The University, since it was well within the guidelines, was acting in accord with accepted university practices. It was, therefore, entirely appropriate that Mayberry, in his fifth

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missal and nonreappointment or *nonrenewal* . . . . Unfortunately, these two terms are too frequently used as synonyms. . . . Reference is often made to those whose probationary contracts are not renewed as having been "dismissed." The distinction is of immense importance, and it must be preserved if sound personnel practices are to have any prospect of success.

Dismissal, whether during a term or a tenured appointment, is a grave action, which should be undertaken only for cause, with full procedural safeguards, and with the burden of proof resting on the institution to demonstrate before proper tribunals that dismissal is warranted.

. . . But the decision not to reappoint or not to grant tenure is not a form of dismissal. Nonreappointment is a regular and indispensable feature of any tenure system that includes a selection process resting on probationary service. Only if probationary periods are truly probationary, only if some are selected for continued service and others are not, will tenure have any significance as the principle for assembling the faculty best suited to the institution's present and future needs.

Id. 256-57.

year, was still a probationary teacher. His employment, covered by his contract for the fifth year, would be fully subject to nonrenewal, and, indeed, would have to terminate subject to the extra year required to satisfy notice obligations. Unlike the situation in all previous years, Mayberry, in the fifth year, was no longer eligible for reappointment to further *probationary* status for another year.[34] The fifth year was the last possible year in probationary status. Following it were only two possibilities: (1) he would serve out his sixth, or terminal (no longer probationary), year and then depart,[35] or (2)

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[34] In this important regard, Mayberry's position was to be contrasted with the situation in *Board of Regents v. Roth, supra,* where the plaintiff had only served one initial year of a probationary period fixed at a maximum of four years by the educational policy of the State of Wisconsin. Hence, should it have been determined that Roth's nonreappointment was due to infringement of First Amendment rights, the remedy of reinstatement would have served to continue him *in the same category.* The reinstatement would be for an additional year in probationary status. That is altogether different from the "reinstatement" sought by Mayberry. His claim is to permanent, i.e., tenured employment, in place of the one-year probationary status which was all he was entitled to prior to the time when the supposed imbroglio on which this law suit centers was set off by his remarks about his department chairman. Mayberry's probationary status having reached the stage where it no longer was extendable or renewable, Mayberry had to succeed in the upward leap to a tenured position, or leave. The difference is a fundamental one. A one-year extension of probationary status simply does not entail the permanency of employment that a grant of tenure confers. Mayberry received a one-year extension, covering the year following the 1972 decision not to grant him tenure. *See* n.6, *supra.*

[35] It must be appreciated that other factors than simply the competence of the candidate for tenure are involved. A university is compelled to employ the system of "up or out" (*see Faculty Tenure,* 121-22) even in the case of very good teachers, not because of a streak of cruelty but because of the university's nature as a living and growing organism. Since a university's life should be structured as much as possible to allow opportunities for some of each year's crop of incipient scholars to be considered for entry

he would be granted tenure—a significantly different status—effectively a new job.

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into the intellectual continuum, such freedom to terminate those considered for, but not granted tenure, even though qualified, is necessary to make place for those following behind.

Otherwise a university's teaching positions would, in a short time, all be permanently filled, with consequently change and growth among its faculty restricted to the relatively infrequent occurrences occasioned by death, retirement or resignation. Resignation, of course, would usually, if not predominantly, come from the very best members of the faculty whose excellence has assured that there is a competing demand for their services. Other institutions will be constantly seeking to woo them away. Those are the professors to whom a grant of tenure has or will come almost as a matter of course. They are the teachers who, insofar as their personal security is concerned, have the least need for a tenure system. *Faculty Tenure*, 117. Yet, for them, the insurance of the institution's integrity which a functioning tenure system is designed to guarantee is of such importance that it is regarded as altogether unlikely that the best could be lured to join the faculty of a university in the first place without a sound tenure system.

If, in short, a grant of tenure were merely a function of competence and passage of the probationary period, a potentially moribund academic society would emerge, with devastating consequences for the success, and ultimately the future of the educational entity.

Indeed, it merits emphasis that all the qualifications in the world do not guarantee a grant of tenure. The need not to have too many in a department of the same age group, the corresponding need to hold open permanent positions for filling with scholars who come along some years later, thereby promoting a desirable age distribution, are factors properly to be taken into account. It may and does happen that two eminently qualified scholars may arrive at the tenure decision rung in the ladder at exactly the same time. One may be granted tenure and the other not though everyone concerned would agree that a reversal of the decisions would make as much or as little sense.

Going one step further, a department chairman would be acting well within his rights to recommend that neither of the two eminently qualified candidates be granted tenure, simply because the departmental age patterns make it reasonable to wait several years in the hope that someone providing a better age fit will appear with qualifications comparable to, or even superior to those of the

In establishing that, where other, permissible grounds existed supporting a decision not to rehire a teacher, a

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two currently under consideration. Permissible reasons for a non-grant of tenure include, *inter alia*, "(2) performance and qualification which although satisfactory will not enable the institution to achieve its educational objectives and standards." *Faculty Tenure*, 70.

And there may be, as there was in the University's case, a decline in demand for certain courses (here Spanish) which created another factor of relevance to the decision of whether or not to grant tenure. Among other permissible grounds are:

> . . . (3) full staffing at the tenure level in the areas of the candidate's principal competence or specialty; (4) changes in the institution's academic program; (5) budgetary constraints which make it impossible or imprudent to renew the appointment or to increase the tenure staff.

Id.

In short, it by no means follows that everyone arriving at the year in which consideration for tenure must take place will be selected for tenure, however qualified the teacher may be. It simply is not an acceptable legal progression to go from (a) Mayberry was qualified, to (b) he exercised free-speech rights, to (c) what he uttered was critical of Fernandez, to (d) and, since he was qualified, the explanation of the non-grant of tenure must be the impact of Mayberry's exercise of his free-speech rights. The inference is unwarranted, the syllogism flawed. Even apart from the failure of proof that Fernandez, at any time prior to April 13, 1972, knew of Mayberry's direction of criticism at him and the abundance of proof that the decision would, in all events, have run against Mayberry because of the need to reduce staff, there still must be a basis to support a finding that Mayberry was turned down for tenure because (a) Fernandez, in giving any weight to the free speech exercise by Mayberry, did so in terms of "He's qualified, and, beyond that, I would have favored tenure for him, had he not said what he said, but I'll fix him for being critical of me." In the present case, because of the plaintiff's failure to prove essential items of Mayberry's case in chief, the question does not arise. But it merits mention that, even with a burden shift to Fernandez through adequate proof that he knew before April 13, 1972 that Mayberry had been critical of him, nevertheless, defendants should not be held liable if they could prove that Fernandez considered the criticisms only in terms of "Is a man who says such things,

Board of Education might take into account the First Amendment protected conduct to make it more certain

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lacking in taste, if not scurrilous, of me *or anyone else*, the kind of person, with the requisite degree of collegiality, on whom we want to confer one of our limited number of tenured positions?" Or that, having considered it in that light, Fernandez decided not to recommend a tenure grant.

To that extent, one may, without offending the Constitution, base a decision not to recommend tenure on the content of remarks, although they enjoy First Amendment protection. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

It is remarkable that Mayberry, himself, recognized, before things developed into litigation, that his behavior had left something to be desired in the area of interpersonal relationships. On January 25, 1973, he wrote to Fernandez apologizing, saying: "I deeply regret my unkind actions. Would you please accept my apology . . . for all the displeasure that I may have caused you this year."

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 285-86 (1977) has this trenchant observation:

> One plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact *would* have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.
>
> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not

of the correctness of its decision, the Supreme Court held:

> This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 286 (1977).

Those consequences of reaching the fifth year as a probationary teacher were well known to Mayberry. They generally pertain to recommended university policy. Under them, Mayberry's old job with the University had to

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> engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

(Emphasis in original.) That statement respecting a teacher at the secondary school level is *a fortiori* true of a university professor, where department groups are customarily smaller and collegiality a factor of greater importance. We have, here, of course, no occasion to inquire whether a different rule, more stringent for the teacher, might apply for universities in view of the dissimilarity in educational levels and objectives.

Accord Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979). *Cf. Cherry v. Burnett*, 444 F. Supp. 324 (D. Md. 1977).

come to an end. Only if he should be selected by the University for the new job—that of tenured professor—might he remain.

To reiterate, it was not enough for Mayberry simply to show an exercise of First Amendment rights, followed by a denial of tenure. That *post hoc propter hoc* approach[36] wrongfully eliminates the manifold other requirements to be satisfied, some quite independent of the candidate's qualifications, before tenure is conferred.[37] If the two quite distinct types of employment: (a) probationary, with no assurance of reappointment after the fixed contract period and (b) tenured, with virtually guaranteed employment until the age of retirement is reached, related to two different employees or candidates for employment, the grounds on which the claims of the plaintiff rest would largely evaporate. Someone from outside the university would have an almost impossible task, given the many and varied, inevitably subjective factors,[38] going into a decision to offer tenure,[39] in estab-

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[36] Such an approach manifestly would bring the entire delicate process of teacher staffing in American universities to a screeching halt. Dr. Fernandez was known to play a paramount role in the tenure decision, and if the *possibility* of retaliation were all Mayberry had to prove to allow a jury to find in his favor, there would be no practical way to deny tenure to anyone.

[37] University budgetary considerations, projected increases or declines in the expected number of students and the courses they might be interested in pursuing, the candidate's relationships to other professors in the department, the possibility, in terms of age, of foreclosing future tenure grants over too long a period, the compatibility or incompatibility of the candidate's theories and methods of instruction, to mention but some major considerations.

[38] *Clark v. Whiting*, 607 F.2d 634, 639 (4th Cir. 1979):

> A teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests.

Mabey v. Reagan, 537 F.2d 1036, 1044 (9th Cir. 1976).

[39] Encapsulated: scholarship capabilities, teaching proficiency, quality of service to the university, and collegiality.

lishing that he would have been tendered tenure employment but for something he said or wrote which fell within the protection of the First Amendment. *Cf. Franklin v. Atkins*, 562 F.2d 1188 (10th Cir. 1977), *cert. denied*, 435 U.S. 994 (1978). So far as the probationary employee *in his final year* is concerned, he is in a comparable status as to what he must prove, since for the one time only he is formally under active consideration for tenure. His advantage lies simply in the fact that improbability will not seem quite so rampant with respect to any claim by him of First Amendment violation because of his prior intimate association with the institution and its faculty.

Thus, no inference favorable to Mayberry's case is to be drawn from his previous satisfactory, annually renewed probationary service. The attempt to step up to tenured status introduced too many other considerations which would explain what happened to permit the jury to decide that Mayberry was in some way mistreated simply because his connection with the university was allowed to come to an end after five one-year renewals of his probationary status.

III.

The Remarks of Mayberry Have Been Assumed to Have the Status of Constitutionally Protected Utterances

There is no suggestion intended that the First Amendment is totally vitiated in tenure cases. We do not accept appellants' contention that the remarks by Mayberry merely reflected bickering, disruptive of harmony not entitled to any First Amendment protection, a route to decision followed by a number of courts confronted with litigation not unlike the present case. *See Roseman v. Indiana University of Pennsylvania at Indiana*, 520 F.2d 1364, 1368 (3d Cir. 1975) (". . . we have concluded that plaintiff's communications fall outside the First Amend-

ment's protection."), *cert. denied*, 424 U.S. 921 (1976).[40] We are loath to say that there was no First Amendment dimension whatever to utterances by Mayberry so that, even had the evidence sufficed to support a finding that, if Mayberry's criticisms had not been made, Fernandez demonstrably was prepared to recommend him favorably for tenure, still Mayberry could not have recovered. *See Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). Similarly, we are not disposed to conclude that Mayberry's expressions were only a jumping of the gun, no more than an attempt to erase the handwriting on the wall. The record, while indicating that Mayberry's disapointment was, in point of fact, inevitable because of the necessity for staff reduction in the department, did not establish that he knew so when he made his protected critcisms.[41]

IV.

Conclusion

In conclusion, we observe that the law, in its insurance of justice in one context, should not, unwittingly, become a tool for meting out injustice in another. It is for that reason that more than suspicion, more than unproven possibilities are required before the Court may

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[40] *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); *Chitwood v. Feaster*, 468 F.2d 359, 360-61 (4th Cir. 1972); *cf. Schmidt v. Fremont County School District No. 25*, 558 F.2d 982 (10th Cir. 1977); *English v. Powell*, 592 F.2d 727, 732 (4th Cir. 1979); *Cooper v. Johnson*, 590 F.2d 559, 562 (4th Cir. 1979).

But see Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563 (1968); *Jawa v. Fayetteville State University*, 426 F. Supp. 218, 229-30 (E.D.N.C. 1976), *aff'd without opinion*, 584 F.2d 976 (4th Cir. 1978).

[41] *Cf. Johnson v. Cain*, 430 F. Supp. 518, 520 (N.D. Ala. 1977); *Russo v. Central School District No. 1, Towns of Rush, et al., County of Monroe, State of New York*, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

intervene in the operation of the tenure conferring process.[42] It is our conclusion that Mayberry's case rested on no more than unsubstantiated conjecture, and must be decided against him, the party on whom is placed the burden of persuasion.[43]

REVERSED.

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[42] *Faculty Tenure*, 188:

> Courts have generally been reluctant to interpose their authority to develop a special subfield of substantive law for academic tenure.

Id. 192:

> The courts have not even begun to determine, as Nathan Glazer has put it, "what a university requires and may properly demand of a faculty, quite independent of any constitutional standard." Glazer's construction of tenure distinguishes sharply "between a man's role as a citizen and his role as a member of an institution with some autonomy." Like Perkins, he is fearful of putting the university at the mercy of lawyers and judges, who may, in the course of developing their legal positions, "come to views of the limits of free speech and the proper tests that may determine these limits that are in one way or another contradictory to the essential purposes of a university." Although the constitution fully protects a citizen, Glazer argues that it should not protect him fully in his academic role. Tenure cannot allow professors to urge a university's physical destruction, for example, regardless of whether such speech breaches constitutional standards [i.e., is or is not protected speech].

[43] There also remains the pendent state claim of an alleged breach of contract. The contract is essentially the Faculty Manual of the University, only parts of which appear to be contained in the record. Nothing therein substantiates the claim of breach of contract. The assertion essentially boils down to the contention that Mayberry's academic freedom rights have been infringed. However, in the context of the case, that amounts to no more than a reassertion, in a different guise, of the First Amendment invasion claims. *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973):

> However, we do recognize that, although academic freedom is not one of the enumerated rights of the First Amendment, *Parducci v. Rutland*, 316 F.Supp. 352, 355 (M.D.Ala. 1970), it

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is now clear that academic freedom, the preservation of the classroom as a "market place of ideas," is one of the safeguarded rights. *Healy v. James*, 408 U.S. 169, 180-81, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972).

Accordingly, the pendent state claim falls with the federal claim. *Cf. Hostrop v. Board of Junior College District No. 515, Counties of Cook and Will and State of Illinois,* [illegible] F.2d 569, 580-81 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (19[illegible]).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WASHINGTON DIVISION

Civil No. 805

ROBERT J. MAYBERRY,

Plaintiff,

vs.

WILLIAM DEES, *et al.*,

Defendants.

January 4, 1978

ORDER

Both parties have filed post-judgment motions in this action and they are now ripe for decision. Plaintiff has moved under Federal Rule of Civil Procedure 59(e) to alter and amend the judgment as entered; and correspondingly, the defendants have moved pursuant to Rules 50(b) and 59 for a judgment notwithstanding the verdict, or in the alternative a new trial.

At the court's August 23, 1978 civil session in Wilson, North Carolina, plaintiff Mayberry received a jury verdict for actual damages on two theories of relief: (1) that the defendants had failed to renew his contract of employment as an instructor in the East Carolina University Spanish Department for reasons impermissible under the First Amendment; and (2) the defendants had violated the provisions of the University Faculty Manual in reaching their non-renewal decision. Plaintiff was also awarded $5,000.00 in punitive damages against defendant Fernandez, individually, for maliciously violating his constitutional rights.

Judgment was entered by the court on November 21, 1978 for $81,885.00 in back salary[1] against the defendants in their official capacities, and $5,000.00 against defendant Fernandez in his individual capacity. Mayberry's prayer for equitable reinstatement with tenure and ten years' seniority was denied.

This judgment is at issue here and upon further reflection raises more thorny issues, requiring greater explication than first perceived by the court.

Plaintiff seeks alteration and amendment of the judgment so as to allow a monetary recovery against the defendants in their individual as well as official capacities. He also asks the court to reinstate him with "ten years' seniority" which would presumably afford him tenure.

Dr. Mayberry's proposed liability amendment is somewhat puzzling in light of the trial evidence. Fernandez was the only defendant against whom evidence was presented indicating he may have violated plaintiff's constitutional rights in a "wanton, knowing or malicious" manner. *See Wood v. Strickland*, 420 U.S. 308 (1975). The other defendants were administrators and officers of the University who acted within standard procedures to accept the department chairman's recommendation even though Mayberry charged arbitrary and unconstitutional treatment. *See Douglas v. Muncy*, 570 F.2d 499 (4th Cir. 1978). Their liability therefore adheres strictly in an official capacity.[2]

Plaintiff cited *Burt v. Board of Trustees*, 521 F.2d 1201 (4th Cir. 1975), to support his proposal to amend the judgment, but did not mention that the case had

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1 As stipulated by the parties for past academic salaries from 1973 to 1978.

2 The question of what, if any, immunity these defendants should be accorded in either their official or individual capacities was not raised by the parties. *See Procunier v. Navarette*, 434 U.S. 555 (1978), and discussion *infra* at footnote 9.

again been the subject of an appellate decision—*Burt v. Abel, et al.*, —— F.2d ——, No. 76-2080 (4th Cir., Sept. 29, 1978). This opinion acknowledged the difficulties inherent in suing a school board under 42 U.S.C. § 1983 prior to the Supreme Court's decision in *Monell v. Department of Social Services of City of New York*, 98 S.Ct. 2018 (1978), and remanded the litigation to Judge Blatt for the corresponding reconsideration.

Although *Monell* has obviated the problem of recovering back pay from a local governmental entity, and its agents acting in their official capacities, it only serves to ripen the analogous issue here. Plaintiff implies as much in requesting the instant amendment and blandly stating on page 9 of its trial memorandum that "individual liability under § 1983 is unaffected by the Eleventh Amendment." Certainly, a verdict rendered against a state official in his official capacity would have to come out of the state treasury, thereby involving the Eleventh Amendment. *See Edelman v. Jordan*, 415 U.S. 651 (1974).

Two questions therefore arise: whether the State of North Carolina is a "person" within the meaning of 42 U.S.C. § 1983; and if so, whether the Eleventh Amendment bars plaintiff's back pay recovery from the named defendants.

Justice Brennan, concurring in *Hutto v. Finney*, 98 S.Ct. 2565, 2579 (1978), has pronounced these questions open in light of *Monell* and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), yet only one circuit and a district court have addressed them thus far, with contrary results within the same circuit.[3]

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[3] In *Aldredge v. Turlington*, —— F.Supp. ——, 47 U.S.L.W. 2370 (N.D.Fla., Nov. 17, 1978), Judge Stafford held in a detailed opinion that the states are persons within the meaning of Section 1983, and by ratifying the Fourteenth Amendment have waived their immunity from suit under legislation enacted by Congress pursuant to Section 5 of the Fourteenth Amendment. The Fifth Circuit in

After a thorough review of the relevant case law and legislative history, this court concludes that the state is indeed a "person" for Section 1983 purposes, and the Eleventh Amendment is no bar to enforcement of Dr. Mayberry's back pay award.

The reasons *Monell* gave as to why a municipality was a "person" under Section 1983 are relevant in our inquiry. First, Section 1983 is to be liberally construed in providing a comprehensive remedy for the violation of federally-protected civil rights. If the court felt municipalities, through their official acts, could "equally with natural persons create the harms intended to be remedied by § 1 [of the Act] . . .", then surely the pervasive nature of state action would be an even greater source of potential harm. 98 S.Ct. 2033-34. The passages of legislative history cited by *Monell* support such a conclusion as to the states.[4] Second, the Dictionary Act, passed only months prior to Section 1 of the 1871 Civil Rights Act, provided the word "person" in Congressional enactments, "may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense[]." 98 S.Ct. 2035 and n. 53. In reaching its decision, the court in footnote 51 referred to Chief Justice Marshall's opinion in *United States v. Maurice*, 2 Brock 96, 109 (CC Va. 1823), which held the United States was a government and consequently "a body politic and corporate." This, coupled with *Monell's* holding as to municipalities, leads ineluctably to the conclusion that states are bodies politic and corporate, and therefore "persons" to whom the 1871 Act was applicable.

Bogard v. Cook, —— F.2d ——, No. 76-2890 (Dec. 15, 1978) reached an opposite result with far less discussion and by citing *Edelman v. Jordan, supra.*

[4] See particularly the remarks of Representative Bingham at 2033 n.45, Representative Poland at 2030, Representative Burchard at 2031, and Senator Edmunds at 2033.

An argument that the Tenth and Eleventh Amendments grant states a higher level of sovereignty than that accorded municipalities vis-a-vis the federal government appears without merit in light of *Monell's* review of the pertinent legislative history. Justice Brennan's majority opinion speaks expansively of a damage remedy against "state or municipal *officials* who violated federal constitutional rights while acting under color of [state] law." 98 S.Ct. 2031 (emphasis in original).

Additionally, many of the federal court decisions, predating *Monell*, which held states were not persons under Section 1983 did so only because of the holding in *Monroe v. Pape*, 365 U.S. 167 (1961). They did not discern a higher form of sovereignty for states from the Tenth and Eleventh Amendments. *See Fitzpatrick v. Bitzer*, *supra* at 452, and *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84, 86 n. 2 and 3 (3d Cir. 1969) (cases cited therein). Finally, allowing a plaintiff to recover directly against local governmental units yet barring such recoveries against the states would ignore not only the realities of our present federal system [5] but the degree to which state governments act with and through their local counterparts.[6]

The Eleventh Amendment, similarly, is not an impediment to maintenance of a Section 1983 suit for back salary against state officers in their official capacities. Although the Amendment's wording may lend itself to a narrower construction,[7] the court has construed it to

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[5] For a more thorough discussion of the historical and constitutional antecedents of state sovereignty, particularly the Eleventh Amendment, *see* Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines," (pts. 1 and 2), 126 Pa. L.Rev. 515 and 1203 (1977-78).

[6] Justice Rehnquist in dissenting recognized as much in *Monell*, *supra* at 2051 n.4.

[7] A strict reading of the Amendment's language would limit a state's immunity to actions brought by "citizens or subjects of any foreign state." *See* Field, *supra*, pts. 1 and 2 at 1210, 1228 and 1261.

grant a state absolute immunity in actions brought by its own citizens. *Edelman v. Jordan, supra.* An exception has since developed in which a state is deemed to have waived its immunity where a suit is brought under federal legislation enacted pursuant to Section 5 of the Fourteenth Amendment, and Congress has authorized suit against a class of defendants including states. *Fitzpatrick v. Bitzer, supra* at 453-57.

This exception is applicable in the instant case. *Monell*'s discussion of the 1871 Civil Rights Act (Section 1 presently being Section 1983 of Title 42) indicates it was passed to provide a far-reaching remedy for Fourteenth Amendment violations. The Act's legislative history, discussed *supra*, further suggests an intent by its authors to subject the states and their officers to suits under present Section 1983. Correspondingly, the court in *Fitzpatrick, supra* at 452, recognized that no "consent" was found in *Edelman* because there the statutes relied upon by plaintiffs contained no authorization by Congress to join the states as defendants. This conclusion was premised on the *Monroe v. Pape* holding which excluded cities and municipal corporations from suit, *ergo* states would certainly not fall within the intended defendant class. *Monroe*'s re-examination and overruling in *Monell* undermines this conclusion,[8] thus removing the Eleventh Amendment as a bar to Mayberry's recovery.[9]

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[8] *Alabama v. Pugh*, 98 S.Ct. 3057 (1978), cryptically and without discussion reaffirmed the Supreme Court's holding in *Edelman*. Justice Stevens, in dissent, noted the limited nature of the majority's *per curiam* result and expressed doubt that they intended to resolve the *Edelman-Fitzpatrick-Monell* issue in such summary fashion. This court agrees with Justice Stevens that the procedural posture of *Pugh* made it a uniquely inappropriate case for deciding a state's amenability to suit under Section 1983, and in turn, does not make it dispositive here.

[9] *Monell, supra* at 2041, raises the possibility that municipalities may be entitled to some form of qualified immunity, its parameters to be developed by the lower federal courts. Consequently, if a state

Having decided plaintiff's back salary is recoverable from defendants, we now move to his request that the court reinstate him with ten years' seniority, thereby giving him tenure.

Initially, none of the cases cited by the plaintiff require reinstatement as a matter of law but leave it to the judge's equitable discretion. *See Burt v. Board of Trustees, supra* at 1205-1206 and n. 6. True, the Fourth Circuit has generally required reinstatement when a public employee has been dismissed for constitutionally-protected conduct, *Jannetta v. Cole*, 493 F.2d 1334 (4th Cir. 1974), but this does not abrogate the court's responsibility to balance all the facts and circumstances, and analyze the deterrent effect that monetary damages would have on the University's propensity to engage in

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were liable under Section 1983, it would be entitled to similar immunity. *Compare Norton v. United States*, 581 F.2d 390 (4th Cir. 1978).

Although the court itself focused upon and decided the instant Section 1983 question, the immunity problem is not before it because the defendants have never pled an immunity defense of any kind. From the outset, plaintiff alleged damages against the defendants in their individual and *official* capacities. The prevailing case law had held consistently that recoveries against state officials in their individual capacities would necessarily be paid from the state treasury, and therefore were barred by an immunity derived from the Eleventh Amendment. *See Burt v. Board of Trustees*, 521 F.2d 1201 (4th Cir. 1975). Furthermore, immunity defenses are affirmative defenses which F.R.Civ.P. 8(c) requires be pled in the first responsive pleading, *Green v. James*, 473 F.2d 660 (9th Cir. 1973); if not, they are waived.

Such a waiver has taken place here. Even if the *Monell-Fitzpatrick* problem could not have been anticipated, the defendants were certainly aware that any ultimate recovery against them in their official capacities would have been foreclosed by *Edelman*. This possibility should have been anticipated from the date suit was filed and an immunity defense pled pursuant to the Eleventh Amendment. A pleading along these lines would have sufficed to open the present inquiry to what, if any, immunity the state possesses in Section 1983 suits.

similar unconstitutional activity. *Decker v. North Idaho College*, 552 F.2d 872, 874-75 (9th Cir. 1977).

The present case is unique and requires an atypical result for a number of reasons. First, although the jury found plaintiff was improperly dismissed, the evidence reflected an insubordinate dimension to his protected criticism which took on an added harshness after he was denied tenure. These are factors which may not denigrate the protected quality of Mayberry's speech, but are relevant in the court's remedy consideration.

It is common learning that, while not necessarily a bar to recovery, a party's conduct in connection with his equitable claim affects the type and degree of remedy. *See* Dobbs, *Remedies*, § 2.4 at 46 and n. 3 (1973), and *cf. Ayers v. Western Line Consolidated School District*, 555 F.2d 1309, 1322 n. 22 (5th Cir. 1977), *cert. granted sub nom*, —— U.S. ——, 46 U.S.L.W. 3616 (April 4, 1978).

Another significant point is the passage of more than five years between the time plaintiff was denied tenure and his jury verdict. It is crucial that public university professors achieve and maintain high competence levels for scholarship and instruction. During the period in question, plaintiff did not teach or publish articles in his areas of expertise but merely read and researched "towards" the publication of various papers and a book to be co-authored with his wife. By reinstating Dr. Mayberry and thus presenting him with teaching assignments, the court would be concluding he is competent to bear such a load without an objective, realistic appraisal of his professional and instructional skills at the present time. *Cf. Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 578-79 (7th Cir. 1975).

Plaintiff's substantial recovery in back salary and punitive damages raises several other considerations. First, Dr. Mayberry and his wife will be expected to

teach in the same department with an individual and his spouse from whom they have directly collected a punitive award. His verdict was also the culmination of a series of acrimonious legal and administrative proceedings which aroused the emotions and loyalties of many faculty members for and against plaintiff (as evidenced by the trial testimony and post-trial faculty affidavits). This course of events does not presage the most harmonious academic setting, human nature being what it is, and the University and students will surely bear the consequences.

Finally, the court is loathe to interfere in state personnel decisions, particularly when tenure for a university professor is involved. The court is under the impression that the typical tenure evaluation takes five years and analyzes in detail a candidate's professional attributes and achievements. Plaintiff should not be given tenure when, originally, he had no property interest in his position. Due to his five-year absence from teaching and publishing, reinstatement would therefore place him in limbo until a sufficient period of time had elapsed for the faculty to make a meaningful tenure evaluation. The continued involvement of the federal courts at this level of state decision-making, when other remedies are available, strains equity's principles.

In summary, rights, constitutional and otherwise, do not exist in a vacuum—their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect. *Carey v. Piphus*, 98 S.Ct. 1042, 1047 (1978). Balancing the facts and circumstances surrounding this case with the substantial monetary awards garnered by plaintiff, reinstatement with tenure appears unwarranted, impractical and unnecessary. Not only have Dr. Mayberry's constitutional and contractual injuries been fully compensated but his back salary award, coming directly from the state, insures that the North Carolina University sys-

tem will respect prospectively the First Amendment rights of associate professors. The punitive damage award against ex-department chairman Fernandez also serves as a deterrent to pernicious inter-departmental intrigue. Accordingly, plaintiff's motions for further equitable relief are denied.[10]

Defendants' motions are meritless and can be disposed of quickly. Their contention that no basis existed for sending the First Amendment issue to the jury is refuted by the evidence. Plaintiff's "speech", consisting of complaints and attempts to organize opposition to certain departmental policies, was protected because its subject matter impacted upon the public at large, encompassing questions central to foreign language instruction in a state-supported institution. *See Pickering v. Board of Education*, 391 U.S. 563, 572 (1968). Also, his speech did not lose its First Amendment protection because it was prudently directed to his colleagues and academic superiors rather than the local newspapers, i.e., a "public forum". Such a requirement would handicap the ability of public employees to work for change from within institutions and systems thereby inordinately burdening their First Amendment exercise. *Pilkington v. Bevilacqua*, 439 F.Supp. 465, 474-76 and 478 n. 11 (D. Rhode Island 1977).

Satisfying this requisite, questions of fact remained as to whether the decision not to renew plaintiff's contract was "substantially caused and/or motivated" by his criticism of the department chairman, and whether the defendants would have taken the same action regardless of his criticism. On these points, the jury instructions

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[10] Counsel for plaintiff filed an affidavit on December 27, 1978 referring to a response made by the court concerning the possibility of reinstatement. Counsel was correct in his surmise that the affirmative indication (which the court does not recall) was meaningless, and the issue was undecided until the judgment was filed on November 21, 1978.

were given and issues submitted in accordance with *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977); the findings in plaintiff's favor were supported by the evidence at trial.[11]

Defendants' objections concerning Dr. Mayberry's Fourteenth Amendment claims are superfluous. No due process or equal protection issues were submitted to the jury because the court did not deem such issues to have been raised by the evidence.[12]

Contrary to defendants' position, the breach of contract claim was adequately pled under Rule 8, and the court can always raise issues to conform to the evidence when those issues are tried by express or implied consent of the parties, as was done here. F.R.Civ.P. 15(b). The jury instruction on this issue was given pursuant to *Kilcoyne v. Morgan*, 535 F.2d 1250 (4th Cir. 1976) (unpublished), and is supported by sufficient evidence.

Finally, defendant Fernandez objects to the imposition of punitive damages against him individually. The jury charge on this question parallelled the Supreme Court's standards as enunciated in *Wood v. Strickland*, *supra* at 319, and the jury's verdict is evidentially supported within the meaning of *Carey v. Piphus*, *supra* at 1049 n. 11.

Defendants' motions for a judgment notwithstanding the verdict, or in the alternative for a new trial, are therefore denied.[13]

---

[11] Concededly, the question was a close one, and had it been left to the court rather than the jury, decision might well have gone the other way.

[12] These issues were limited initially by Judge Larkins' order of September 14, 1977, and plaintiff's counsel further admitted the Fourteenth Amendment's inapplicability in a dialogue with the court during argument on defendants' motion for a directed verdict.

[13] Defendants also filed a motion to stay the judgment's execution. Although interest on this judgment ran from the verdict date, the filing of post-judgment motions automatically stayed execution, thereby making this motion unnecessary.

In light of this and the foregoing discussion, the court's judgment of November 21, 1978 stands as final.

SO ORDERED.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
United States District Judge

January 4, 1978.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WASHINGTON DIVISION

Civil No. 805

ROBERT J. MAYBERRY,
Plaintiff,

vs.

WILLIAM DEES, *et al.*,
Defendants.

November 21, 1978

JUDGMENT

This action came on for trial before the undersigned Judge and a jury at the August 23, 1978 civil session of the court at Wilson. In answer to issues submitted, the jury rendered its verdict as follows:

1. Was the decision by the defendants not to renew the plaintiff's contract of employment motivated and substantially caused by the plaintiff's criticism of his Department Chairman:

Answer: Yes.

2. If the defendants' decision not to renew plaintiff's contract of employment was motivated and substantially caused by his criticism of his Department Chairman, would the defendants have taken the same action even in the absence of plaintiff's criticism of his Department Chairman?

Answer: No.

3. Did the defendants violate the provisions of the East Carolina University Faculty Manual in reaching the decision not to renew the plaintiff's contract of employment?

Answer: Yes.

4. Is the plaintiff entitled to recover actual damages by reason of the failure of the defendants to renew the plaintiff's contract of employment?

Answer: Yes.

5. If you have answered the first issue "yes", and the second issue "no", or if you have answered the third issue "yes", or in either case answered the fourth issue "yes", what amount of punitive damages, if any, is the plaintiff entitled to recover of the defendant, Joseph Fernandez, as an individual?

Answer: $5,000.00

It was stipulated by the parties during the trial of this action and prior to the close of plaintiff's case-in-chief that the court might assess the actual damages, if any, which the plaintiff herein would be entitled to if the jury returned a verdict in his favor. It was further stipulated that plaintiff's salary for the academic years 1973-1974 through 1977-1978 would have been as follows:

1. $14,700.00 for the academic year 1973-1974.
2. $15,800.00 for the academic year 1974-1975.
3. $15,935.00 for the academic year 1975-1976.
4. $17,025.00 for the academic year 1976-1977.
5. $18,425.00 for the academic year 1977-1978.

$81,885.00 Total

The court is of opinion that plaintiff is entitled to recover as actual damages the amount of salary which he would have earned during the five years in question.

Plaintiff also asks the court to award him certain equitable relief. Specifically, he asks that he be reinstated to a position on the faculty of East Carolina University as associate professor, that he be granted tenure and that he be credited with ten years "seniority".

While reinstatement normally follows a finding of discharge on constitutionally impermissible grounds, the court is of opinion that such relief should be denied in this case where the evidence showed that plaintiff organized secret meetings to oppose certain departmental policies, spoke against the department chairman to his peers and wrote a scurrilous anonymous letter to him. In support of his claim to reinstatement plaintiff has produced affidavits of some of the teachers in the department to the effect that they would be pleased to have the plaintiff back, but this feeling is not shared by all, and it is simply unrealistic to assume that plaintiff could return in harmony to the department against whose chairman he has obtained in this action a $5,000.00 verdict for punitive damages based on allegations that the chairman terminated his employment for malicious, spiteful and vengeful reasons. And since plaintiff did not have tenure, even if he were reinstated he would still be subject to discharge for any reason not constitutionally impermissible. *Jannetta v. Cole*, 493 F.2d 1334 (4th Cir. 1974).

It is thereupon

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff have and recover of the defendants in their official capacities as listed in the title to this judgment the sum of EIGHTY-ONE THOUSAND, EIGHT HUNDRED EIGHTY-FIVE AND NO/100THS ($81,885.00) DOLLARS with interest from the date of verdict, August 25, 1978, at the rate of six per cent per annum.

2. That the plaintiff have and recover of the defendant, Joseph Fernandez, in his individual capacity, the sum of FIVE THOUSAND AND NO/100THS ($5,000.00) DOLLARS, with interest from the date of verdict, August 25, 1978, at the rate of six per cent per annum.

3. That plaintiff's prayer for the equitable relief of reinstatement to the position of associate professor with tenure and ten years of seniority is denied.

4. That plaintiff recover counsel fees to be set by the court in a separate order; and

5. That defendants pay the costs of the action.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
United States District Judge

November 21, 1978.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1204

ROBERT J. MAYBERRY,
Appellee,

vs.

WILLIAM DEES, *et al.*,
Appellants.

Appeal From the United States District Court for the Eastern District of North Carolina

---

THIS CAUSE came on to be heard on the record and the petition for rehearing, and the said cause was argued by counsel.

JUDGMENT

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, upon rehearing, that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, REVERSED.

/s/ William K. Slate, II
Clerk

Filed, Nov. 5, 1981.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1204

ROBERT J. MAYBERRY,

Appellee,

vs.

WILLIAM DEES, *et al.*,

Appellants.

No. 79-1205

ROBERT J. MAYBERRY,

Appellant,

vs.

WILLIAM DEES, *et al.*,

Appellees.

ORDER

Upon consideration of the petition for rehearing filed by Robert J. Mayberry and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Haynsworth and Judge Hall.

For the Court,

/s/ William K. Slate, II
Clerk

Filed, Dec. 28, 1981.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-801

ROBERT MAYBERRY,
Petitioner,

v.

WILLIAM DEES, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 27, 1982.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 18th day of March, 1982.

Office - Supreme Court, U.S.
FILED
NOV 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2191

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT J. MAYBERRY,

Petitioner,

v.

WILLIAM DEES, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS IMPROPERLY ALLOCATED TO PETITIONER THE BURDEN OF ESTABLISHING HIS FIRST AMENDMENT CLAIM?

II. WHETHER THE COURT OF APPEALS PROPERLY DETERMINED THAT THE EVIDENCE BEFORE THE JURY DID NOT SUPPORT ITS VERDICT?

LIST OF PARTIES

The Petitioner in this proceeding is Robert J. Mayberry, a former member of the faculty of East Carolina University, one of the sixteen constituent institutions of the University of North Carolina. Respondents are present and former officials of the University of North Carolina and East Carolina University. They are:

William Dees, former Chairman of the Board of Governors of the University of North Carolina, who is a party in his official capacity only.

William Friday, President of the University of North Carolina, who is a party in his official capacity only.

Robert Morgan, former Chairman of the Board of Trustees of East Carolina University, who is a party in his official capacity only.

Leo W. Jenkins, former Chancellor of East Carolina University, who is a party in both his official and individual capacities.

Robert L. Holt, former Vice Chancellor for Academic Affairs at East Carolina University, who is a party in both his official and individual capacities.

Robert W. Williams, former Provost of East Carolina University, who is a party in both his official and individual capacities.

Richard Capwell, former Dean of the College of Arts and Sciences at East Carolina University, who is a part in both his official and individual capacities.

Joseph Fernandez, former Chairman of the Department of Romance Languages at East Carolina University, who is a party in both his official and individual capacities.

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No. 81-2191

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT J. MAYBERRY,

Petitioner,

v.

WILLIAM DEES, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request this Court to deny the petition of Robert J. Mayberry for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on November 5, 1981.

OPINIONS BELOW

Petitioner instituted an action against Respondents in the United States District Court for the Eastern District of North Carolina in 1973 in which he alleged that Respondents had violated his constitutional rights of procedural due process, freedom of speech and equal protection of the law in denying him tenure as a member of the faculty of East Carolina University (ECU). At various times, Petitioner has asserted that his complaint also contains a pendent State claim for breach of contract, though Respondents have consistently contested that assertion.

A jury trial was held in August of 1978. During the course of the trial, Respondents were granted directed verdicts on the procedural due process and equal protection claims. The

free speech and contract claims were submitted to the jury and the jury returned a verdict in the Petitioner's favor. The judgment of the District Court is reprinted as Appendix C to the Petition for Writ of Certiorari.

Both parties filed post-judgment motions. Petitioner requested the Court to alter and amend its judgment to grant him reinstatement in addition to monetary damages and Respondents moved for judgment notwithstanding the verdict or, in the alternative, a new trial. All these motions were denied. The District Court's Order is set forth as Appendix B to the Petition for Writ of Certiorari.

Both parties appealed to the Fourth Circuit Court of Appeals. On January 15, 1981 an opinion[1] was issued by two judges of the Fourth Circuit.[2] Both parties petitioned for rehearing and those petitions were granted by order of the Fourth Circuit dated March 18, 1981. The final opinion of the Fourth Circuit is reported at 663 F.2d 502 (4th Cir. 1981) and is reprinted as Appendix A to the Petition for Writ of Certiorari. Subsequent motions by the Petitioner for rehearing and rehearing *en banc* were denied by the Court. These orders are reprinted as Appendices D and E to the Petition for Writ of Certiorari.

After an extension of time, the Petitioner sought review of the final decision of the Court of Appeals by way of petition for writ of certiorari. This brief in opposition to the grant of certiortari is filed by Respondents at the request of the Court.

STATEMENT OF THE CASE

Petitioner was employed as an assistant professor in the Department of Romance Languages at East Carolina University (ECU) from 1967 to 1973. During the six (6) years that Petitioner was employed as an assistant professor, he taught Spanish undergraduate courses, though his doctoral

[1] This opinion is reported at 638 F.2d 690 (4th Cir. 1981) but is not included as an Appendix to the Petition for Writ of Certiorari. Because of the later grant of rehearing this decision appears only in the advance sheets, not in the final published volume.

[2] After oral argument, one judge withdrew because of a possible conflict of interest.

dissertation was a study of an old French poem. (A. IV, 172)[3] He was denied tenure in the spring of 1972.

The Respondent, Dr. Joseph F. Fernandez became Chairman of the Department of Romance Languages in the Fall of 1968. His tenure as chairman was distinguished by his success in raising the standards of the department. (A. IV, 205) During this time, however, the department, in particular, and ECU, in general, experienced a decline in student enrollment. This decline in student enrollment was beyond Dr. Fernandez's control. (A. IV, 205) Indeed, universities throughout the country suffered from a considerable decline in student enrollments during that period which necessitated the elimination of foreign language teaching positions. (A. IV, 78)

This decline in enrollment began during the academic year 1970-1971. (A. III, 60) Enrollment then abruptly plummented during the 1971-1972 academic year, the year in which Petitioner was denied tenture. (A. IV, 157) More precisely, student enrollment in the department declined 37.6% from the 1969-1970 academic year to the 1971-1972 academic year. (A. III, 60) This precipitous decline necessitated, among other things, the reassignment of Spanish teachers to monitor the language laboratory because there were not enough classes for them. (A. III, 60)

During the 1971-1972 academic year, Respondent Dr. Robert W. Williams Jr., then Provost of ECU, informed Respondent Dr. Richard L. Capwell, then Dean of the College of Arts and Sciences, that declining student enrollment necessitated a staff reduction in the Department of Romance Languages. (A. IV, 176-1977) Dean Capwell then informed Dr. Fernandez of this need. (A. IV, 189) Dr. Fernandez executed this direction from the administration. Between the 1970-1971 academic year and the 1974-1975 academic year the faculty was reduced from twenty-nine (29) to eighteen (18), a reduction of staff in excess of 25% (A. III, 60)

In the spring of 1972, regulations of ECU required that decisions be made in regard to the award of tenure to five (5)

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[3]This citation is to the Appendix filed by the parties in the Fourth Circuit by volume and page number.

faculty members in the department. These decisions were "up or out" decisions, i.e, decisions whether tenure and permanent employment would be granted or whether term contracts would be allowed to expire. These five faculty members included the Petitioner and the Petitioner's wife.

In making his recommendations, Dr. Fernandez considered confidential evaluations of these five (5) faculty members prepared by six (6) professors in the department. The collective judgment of these six professors was that Petitioner was the least qualified of the five (5) faculty members under consideration. (A. III, 6-17) Two (2) evaluations recommended granting Petitioner tenure only in order to retain his wife. (A. III 7, 13) Only one (1) recommendation endorsed Petitioner for tenure without qualification. (A. III, 9)

Dr. Fernandez's opinion regarding Petitioner's qualifications coincided with the collective judgment of his colleagues. In July of 1970, Dr. Fernandez noted in regard to Petitioner "Although friendly and likable I should have my doubts about tenure since his is so opposed to my objectives for the department."[4] (A. III, 6) Similarly in May of 1971, Dr. Fernandez noted, "If reduction in staff is forced upon us, would hesitate to give him tenure. Otherwise, would not object." (A. III, 14) These views were noted before the events which gave rise to Petitioner's free speech claim.

Despite the Petitioner's undistinguished academic record, Dr. Fernandez anguished over the decision whether to grant him tenure because of the abilities of Petitioner's wife. He consulted with Dr. John Howell, then Dean of the Graduate School, and Dean Richard Capwell. Dr. Fernandez was instructed that his tenure decision regarding the petitioner should be made on the merits and not because his wife, Dr. Nancy Mayberry, was a valuable asset to the department. (A. IV, 112-13, 145-146, 189-191)

Dr. Fernandez concluded that Petitioner was the least deserving of tenure of the five persons under consideration and because of the need to reduce the size of the staff decided not to recommend the award of tenure to

[4]The objectives to which Dr. Frenandez refers is the use of foreign language in the classroom by teachers.

Petitioner. (A. IV, 143-144; III, 4-5) On April 13, 1972 Dr. Fernandez so advised Dean Capwell. In his letter to the Dean, Dr. Fernandez stated, "[b]ecause of the need to reduce the size of the staff of the Spanish faculty, it is recommended that [Dr. Robert Mayberry] not be granted tenure." (A. IV, 33-34)

Petitioner's wife, of course, was recommended for tenure. She has since been promoted to the rank of associate professor, granted salary increases and awarded an East Carolina Research Council Grant. (A. IV, 27-28). Both prior to and after being granted tenure, Dr. Nancy Mayberry openly voiced her professional differences with Dr. Fernandez in professional meetings. (A. IV, 33-34)

The Petitioner presented no evidence to rebut the fact that he was the least deserving of tenure among those granted tenure in the spring of 1972. (A. III, 4-5; IV, 143-144) He did present evidence that though he holds the Ph.D. degree and was denied tenure, Professor Esther Fernandez, who was granted tenure the preceding year, only holds the M.A. degree. However, Professor Esther Fernandez is an "excellent classroom teacher whose classes have always ranked above the mean for each group in the departmental final examinations, most of them significantly above the mean." (A. II, 34) In any case, the decision to grant tenure to Professor Esther Fernandez in the spring of 1971, but to deny tenure to the Petitioner in the spring of 1972 "was made against an entirely different background. In Dr. Mayberry's case the Romance Languages Department had to cut back on its staff and had to choose among the then untenured faculty in order to accomplish the reduction. There was no such necessity a year earlier when Mrs. Fernandez was granted tenure." (A. III, 65)

The student evaluations by senior Spanish majors likewise reveal that the Petitioner's teaching performance was among the lowest in the department. (A. III, 18-39). For example, a comparison between the Petitioner's and Professor Esther Fernandez's student evaluations reveals that in each instance, except one, the student gave higher marks to Professor Esther Fernandez's. The one exception was an evaluation which gave both of them an identifcal rating.

In the years prior to the 1971-72 academic year, Dr. Fernandez and Petitioner disagreed over the proper amount

of Spanish, rather than English, which should be used by faculty members in the classroom in teaching upper-level courses. Under the standards established by Dr. Fernandez, with which Petitioner disagreed, upper-level courses were to be conducted primarily in Spanish. This disagreement was resolved by the oral agreement of Petitioner to abide by the departmental standard as established by Dr. Fernandez. (A. III, 2; IV, 39-41)

During the academic years prior to 1971-1972, Petitioner had other objections to the manner in which Dr. Fernandez administered the department but in keeping with his *ex parte* style did not make these objections known to Dr. Fernandez. (A. IV, 42-47). These objections may well have been personal, rather than professional, in origin for the Petitioner did not view Dr. Fernandez as his professional equal. (A. II, 62)

During the fall semester of 1971, the events which form the basis for Petitioner's First Amendment claim began to unfold. That semester, the one prior to the denial of tenure to Petitioner, Dr. Fernandez established the membership of the Organization and Administration Committee for Self-Study of the department (hereinafter "Committee"). The membership of the Committee consisted of Dr. Fernandez, Professor Esther Fernandez, his wife, another faculty member and a student. This Committee was responsible for summarizing the *annonymous* questionnaries submitted by the foreign language faculty and for transmitting the findings to the Southern Association of Colleges and Schools, the regional accrediting body. The Petitioner privately expressed his displeasure over this matter to a number of his colleagues. He believed that the Committee structure would stifle opinions expressed in the anonymous questionnaire. (A. IV, 48-51) He did not express those views to Dr. Fernandez.

Encouraged by her husband, Dr. Nancy Mayberry wrote an *anonymous* letter to Mr. Charles Brown, the Chairman of a University-wide steering committee for the self-study. (A. IV, 16, 52) In her letter, she complained that the structure of the Committee was suppressing freedom of speech (A. IV, 17) The Petitioner, himself, subsequently went to Mr. Brown regarding his wife's anonymous letter (A. IV, 52), but that meeting, as well as the contents of the anonymous letter,

remained *undisclosed.* (A. IV, 200-201) Dr. Fernandez, nevertheless, became aware of some unrest within the department, though the nature and source of the unrest were unidentified. (A. IV, 19)

The Self-Study Report, which consisted of anonymous faculty comments summarized by Dr. Ferandez and other members of the Committee (A. IV, 15), contained some remarks which could be construed as cirtical of Dr. Fernandez. (A. IV, 163) The only portion of the Self-Study Report introduced into evidence stated the following:

> CONCERN
> "No attempt was made to guarantee anonymity of faculty comments when replying to the administration and organization questionnaire. Therefore, replies had to guarded to avoid reprisals."
>
> RECOMMENDATION
> "Answers to individual questionnaries would have been more candid if they had been sent to the accrediting association. Actually, deans and chairmen could write and get the 'desired' results." (A. II, 96), (A. IV, 53)

The presence of the above-quoted remarks, critical of Dr. Fernandez's Committee assignments, in a summary prepared by Dr. Fernandez and the Committee are their own self-refutation. The Petitioner presented no evidence that his own anonymous questionnaire was critical of Dr. Fernandez in any respect, much less critical along the lines of the above-quoted remarks.

Dr. Fernandez was unaware of the Petitioner's criticisms of him, whatever they might have been, during the period of the self-study and up to the time he made his recommendations for tenure on April 13, 1972. (A. IV, 151-152) Dr. Fernandez was, however, possibly aware that the Petitioner was not very happy with his performance as chairman prior to making the tenure recommendations. (A. IV, 161) In May 1972, the month after the denial of tenure to the Petitioner, Dr. Fernandez did receive a memorandum from another faculty member who mentioned that the Petitioner had been critical of him during the period of the self-study. (A. IV, 152)

The Petitioner presented no evidence that any of his critical remarks about Dr. Fernandez's departmental policies and decisions were remarks which did or could affect either the department's or the University's accreditation assessment by the Southern Association of Colleges and Schools. Nor did the Petitioner present any evidence that either the department or the University was in danger of losing its accreditation.

The Petitioner, subsequent to his tenure denial, did complain to the Chairman of the Visiting Team from the Southern Association that he was denied tenure because he had "spoken out". (A. IV, 73-74) The Visiting Committee Report states, however, that "[n]o reported cases of infringement on academic freedom were revealed in conversations with administrators, faculty, AAUP executive committee and students." (A. III, 93) The Report further observed that "the College is making a commendable effort to reduce course offerings in some disciplines which have not experienced the growth aniticpated or, indeed, have declines in registrations, notably, in the areas of modern language and history." (A. III, 92)

Neither the Petitioner, his wife, nor anyone else went to the Dean or any other administrator prior to the denial of tenure to complain about Dr. Fernandez's departmental decisions and policies. They had the right to do so. (A. IV, 26, 80-81, 192-193) Nor did anyone in the department go to the Dean and tell him that he feared reprisals if he criticized Dr. Fernandez. (A. IV, 193-194)

After the Petitioner was denied tenure in April 1972, he largely abandoned his policy of criticizing Dr. Fernandez *ex parte* and began openly attacking him. He sent Dr. Fernandez an impertinent memorandum (A. IV, 160) and belatedly complained about irregularities in the tenure granting process the previous year. (A. III, 40) He voiced his criticism of Dr. Fernandez's failure to hold a committee meeting (A. III, 41) and disagreed with Dr. Fernandez over a textbook matter. (A. II, 42) He accused Dr. Fernandez of failing in his responsibility to his colleagues and told him, "If you can't stand the heat, get out of the kitchen." (A. III, 48)

Later the Petitioner changed his tactics and wrote Dr. Fernandez a letter of apology. In the apology letter the

Petitioner pledged *"henceforth* to remove [himself] completely from any action aimed at [his] *embarrassment* ... and [that he] deeply regret[ed] [his] *unkind actions."* (A. III, 49) (emphasis added).

REASONS FOR DENYING THE WRIT

In the spring of 1972 regulations in effect at ECU required "up or out" decisions to be made in regard to Petitioner and four other faculty members, i.e, they were to be granted tenure or their term contracts allowed to expire. On the basis of his performance, Petitioner was judged by his colleagues and department chairman as the faculty member in this group of five least deserving of the award of tenure. Faced with a direction to reduce the size of the faculty in the department, the only logical and reasonable decision open to the chairman of the department was to deny the grant of tenure, with its consequent permanency of employment, to the petitioner. That decision was made and the Fourth Circuit Court of Appeals correctly determined that the evidence before the jury would support no other conclusion.

I. PETITIONER'S ARGUMENT THAT THE CIRCUIT COURT IMPROPERLY ALLOCATED THE BURDEN OF PROOF MISPERCEIVES THE ISSUE BEFORE THE CIRCUIT COURT AND IS WITHOUT MERIT.

In *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977) this Court laid down the order and burden of proof to be followed in evaluating the claim of a public employee that his employment was ended because of his exercise of his freedom of speech. Petitioner argues that the Circuit Court violated these principles in setting aside the jury verdict for him. Specifically, Petitioner argues that the Circuit Court, in the course of its reasoning, placed upon him the burden of proving that speech protected by the First Amendment was a "substantial" or "motivating" factor in the decision to not award him tenure and, contrary to *Mt. Healthy,* the additional burden of proving that he would have been awarded tenure in the absence of his protected speech.

Petitioner's argument is without merit and should be rejected. First, this argument ignores the issue before the

Circuit Court. Second, this argument misreads and takes out of context isolated portions of the Circuit Court's opinion.

The issue for resolution by the Circuit Court was whether the jury's verdict should be permitted to stand; not whether the District Court erred in its instructions to the jury on the burden of proof or otherwise misplaced the burden of proof. In addressing this issue it was the obligation of the Circuit Court to give the petitioner the benefit of all reasonable inferences which could be drawn from the evidence. See, e.g., *Brady v. Southern Railway Co.*, 320 U.S. 476, 479-480 (1943) and 9 Wright & Miller, *Federal Practice and Procedure*, § 2524. A fertile source of inferences in cases in which an employee alleges that he has been illegally terminated from employment is the evaluation of the employee's performance prior to the events which give rise to his claim. See, e.g., *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 804 (1973). Evidence of this type was before the jury in this case. If the Petitioner's propsects for tenure before the events which gave rise to his claim were good, it could reasonably be inferred from his failure to receive tenure that some outside factor intervened. On the other hand, if his prospects for tenure were not good, it could reasonably be inferred that his failure to receive tenure followed in the natural course of events and was not influenced by an extraneous factor. In determining whether the jury's verdict was supported by the evidence it has incumbent upon the Circuit Court to evaluate this evidence and the inferences which flow from it.[5]

In effect then, Petitioner in arguing that the Circuit Court improperly allocated the burden of proof, faults the Court for searching the evidence and examining inferences which could support his jury verdict. He cannot have it both ways.

Moreover, there is nothing in the Circuit Court's opinion to support the Petitioner's claim that the Court improperly allocated the burden of proof upon him in reviewing evidence potentially supportive of the jury verdict. In an effort to establish this claim, he has taken certain statements

[5]This process did not entail any "weighing" of the evidence because Petitioner presented no evidence in rebuttal of the collective judgment of Petitioner's colleagues that he was the least deserving of the five candidates for tenure in the spring of 1972.

by the Court out of context. According to the petitioner:

> "[W]hen the Court undertook its 'statistical analysis' it identified two elements of the 'causality percentage of the case, for which Mayberry, as plaintiff, had the burden of proof' (19a) but had failed to prove: one of the elements was petitioner's likelihood of receiving tenure in the absence of protected speech (18a)." (Petition, p. 13, n. 13)

The Circuit Court's "statistical analysis" appears in one section of the its seven-part analysis of the sufficiency of Petitioner's evidence to withstand a motion for judgment notwithstanding the verdict. The "statistical analysis" itself is illustrative only.[6] That portion of the "statistical analysis", from which petitioner takes bits and pieces, states:

> "That is, the causality percentage of the case, for which Mayberry, as plaintiff, had the burden of proof was but 4/10ths of 1%. Put another way, it is 99.6% certain that denial of tenure was not associated with the protected criticism. In the real, everyday world, the residual 4/10ths of 1% is less than a scintilla, and the case falls for failure of proof." (Petition, p. 19a)

This statement is in no way inconsistent with *Mt. Healthy*. The Circuit Court simply stated that the burden of proof was on the plaintiff to establish that his exercise of his freedom of speech was a substantial and motivating cause of his denial of tenure. And on that burden, the plaintiff failed.

Petitioner's second and final illustration of the alleged improper allocation of the burden of proof upon him by the Circuit Court is the following:

> "We are loath to say that there was no First Amendment dimension whatever to utterances by Mayberry so that, even had the evidence sufficed

[6]The Circuit Court's "statistical analysis" is prefaced by the following statement: "The law is a study and function of human life, not an exercise of automatons. It is, consequently, an aggregate of approximations, not an exact science. So a resort to percentages to demonstrate a point is only to provide an illustration, not to suggest the sufficiency of the evidence can be reduced to such mathematical precision." (Petition, 2. 18a)

> to support a finding that, if Mayberry's criticisms had not been made, Fernandez demonstrably was prepared to recommend him favorably for tenure, still Mayberry could not have recovered. See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)" (Petition p. 35a).

This statement by the Circuit Court appears in the section of the opinion addressing Respondent's argument that Petitioner's remarks were not protected by the First Amendment. This sentence may contain complex phraseology, but it does not indicate that the Circuit Court imposed on Petitioner the burden of proving that he would have received tenure even in the absence of his criticisms. This sentence, in respondent's view, simply reflects the Fourth Circuit's opinion that it could not hold that Petitioner's private criticisms of his department chairman (protected under *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), were a factor in the tenure decision.

In sum, the Fourth Circuit was presented with the issue of whether the evidence was sufficient to support Petitioner's jury verdict. Critical evidence and inferences on that issue related to and flowed from Petitioner's past performance. In examing this evidence and the inferences which flow from it, the Court did not impose any burden of proof upon the Petitioner. The illustrations relied upon by the Petitioner do not indicate the contrary.

II. THE COURT OF APPEALS PROPERLY OVERTURNED THE JURY VERDICT FOR THE PETITIONER.

Petitioner attacks the action of the Circuit Court in overturning the jury verdict for him on a broad front. In essence, however, his argument is that the Circuit Court improperly weighed the evidence before the jury and deprived him of inferences from the evidence to which he was entitled. Petitioner's argument is not well founded.

Whether evidence is sufficient to create an issue of fact for a jury is solely a question of law. *Baltimore and Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1934). And there is no bar to an appellate court granting judgment notwithstanding the verdict. *Neely v. Martin K. Eby Const. Co., Inc.*, 386 U.S. 317,

322 (1967). The standard to be applied in deciding whether a jury verdict should be permitted to stand was succinctly described by this Court in *Galloway v.U.S.*, 319 U.S. 372, 395 (1942).

> "The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general information, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Petitioner's case is based on inferences. He draws inferences which he argues are reasonable and thus sufficient to support the verdict for him. But an examination of the facts establishes that the inferences he draws are unreasonable, unsupported by the evidence and, thus, insufficient to support the verdict. *Id.* At most, his verdict is supported by a scintilla of evidence and that is not enough. *Gunning v. Cooley, 281 U.S. 90, 94 (1930); Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969).

Petitioner may not hold his jury verdict unless there are reasonable inferences from which it may be concluded that a "substantial" or "motivating" factor in the decision of Dr. Fernandez not to recommend the award of tenure to the Petitioner was criticism protected by the First Amendment. *Mt. Healthy v. Doyle, supra.* Under the circumstances of this case, there are two possible sources of inferences to support the Petitioner's verdict. The first source is the strength of Petitioner's propsects for tenure, from which it may be inferred that tenure would flow, or not flow, in the absence of intervening events. The second source is the decisionmaker's knowledge of the protected criticisms prior to making his decision, from which it may be inferred that such criticisms were, or were not, a part of the decisionmaker's reasoning.

There are no facts which support any reasonable inference that Petitioner's prospects for tenure were good. In the spring of 1972 five (5) members of the Romance Languages Department were required to be evaluated for tenure by their senior colleagues and a recommendation for

tenure made by the department chairman. The criteria to be applied were teaching, service and scholarship.

These five persons were Professors Morales, Ambert, Ellenberg, Nancy Mayberry and Petitioner. Manual Morales was judged by his colleagues to be "an effective classroom teacher" with "publications in print" who had received "excellent marks" on senior evaluations (A. III, 4). He was recommended for tenure. Gary Ambert was thought by his colleagues to have special value to the department because of his work in the language laboratory and was unanimously recommended for tenure (A. III, 4). Grace Ellenberg was viewed as a "truely outstanding teacher" whose classroom performance was "extraordinary" (A. III, 4). She, of course, was recommended for tenure. Petitioner's wife, Dr. Nancy Mayberry, was "a successful teacher" and "a promising scholar". Her colleagues recommended her for tenure, though not unanimously (A. III, 5).

Petitioner's performance stands in sharp contrast. As reported by Petitioner himself, his professional activities during the period of his employment were largely limited to teaching. (A. III, 67-84) And his teaching ability, as evaluated by departmental seniors, was judged to be poor. (A. III, 18-19) In fact, several seniors during this time gave his teaching a grade of D (A. III, 20, 21, 26) and several cited his teaching as "especially bad". (A. III, 36-39) Petitioner's colleagues largely shared this judgment. He was evaluated by them as a faculty member with "limited potential" who was lazy" and "who could be more energetic and enthusiastic about classes". [A. III, 7, 8, 10, 12, 13) Their recommendations to the chairman regarding the award of tenure to Petitioner were mixed and focused upon the benefit to the department in retaining Petitioner's wife, not the value of Petitioner's own contributions. (A. III, 7, 10, 11, 13)

Dr. Fernandez' judgment coincided with that of his colleagues and was formed long before the events which gave rise to this lawsuit. In July of 1970, Dr. Fernandez expressed "doubts about tenure" for Petitioner and in May of 1871 noted, "if reduction in staff is forced upon us, would hestitate to give him tenure." A reduction in the size of the staff did in fact become necessary. During the 1971-72 academic year, the administration determined that declining

student enrollment necessitated a reduction in the staff of the department. In the face of this need for reduction in staff size, Dr. Fernandez determined that Petitioner was the least deserving of tenure of the persons under consideration for tenure during that year and recommended to the administration that Petitioner not receive tenure because of the need for reduction in the size of the staff.

These facts are unrebutted and lead to the single logical conclusion that tenure was not in the cards for the Petitioner. Any other inference is illogical and at odds with the unrebutted evidence that Petitioner's performance was not sufficient to justify the award of tenure.

Petitioner, of course, claims that his poor performance was unrelated to the adverse tenure decision and that this decision was made because of his criticism of Dr. Fernandez in connection with the departmental self-study undertaken as a part of the accreditation of ECU by the Southern Association of Colleges and Schools. In examining this claim it is important to define its scope. There are indications in the record that Petitioner was critical of Dr. Fernandez on a number of issues, but the criticism which Petitioner contends is protected by the First Amendment and which motivated Dr. Fernandez to deny him tenure was that Dr. Fernandez was "autocratic" and had "stacked" the departmental committee appointed to review the administration of the department for purposes of the self-study (Petition, p. 4). Thus, the issue for resolution here is whether any reasonable inference exists to support a conclusion that a substantial and motivating factor in Dr. Fernandez' decision to not award Petitioner tenure was Petitioner's criticism of Dr. Fernandez because he "stacked " this committee. It is Respondents' position that no reasonable inference exists that Dr. Fernandez even knew of this criticism prior to making his recommendation on April 13, 1972 and, therefore, that this criticism could not have been a substantial and motivating factor in that decision.

Petitioner relies upon three excerpts from the testimony at trial to support his position. Thomas Williams, a professor in the department, testified as follows:

A: "Prior to that tenure decision, Dr. Fernandez asked me if I had any recommendation for

individuals in the department who might be worthy of promotion to a higher rank. Among other names, I suggested Professor Robert Mayberry.

"Q: All right. Did the Chairman Fernandez have any remarks to make about your suggestion?

"A: He did not react to the other names, but he said that Professor Mayberry was out of the question because he was a troublemaker.

"Q: All right. Did he define what he meant by troublemaker or have any further discussion about that?

"A: At that time, I was so surprised that he would say that — it was so out of keeping with my own experience that I simply did not pursue the conversation further at that particular moment." (A. IV, 94-95)

No inference reasonably supportive of Petitioner's claim can be drawn from this testimony. The conversation was about promotion, not tenure. It occurred at an unspecified time, but probably the winter of 1971 (A. IV, 96). Most importantly, this testimony provides absolutely no basis upon which to draw any inference whether Dr. Fernandez viewed the Petitioner as a "troublemaker" at that time for any reason related in any way to the "stacking" of the Self-Study Committee.

Other testimony from Thomas Williams provides the second leg of Petitioner's argument Mr. Williams further testified:

> "At that time [after the tenure decision], Professor Fernandez said to me, 'No. Professor Mayberry was a troublemaker', and then he went on to specify that during the self-study, Professor Mayberry had said and made critical remarks about the department and that he could not have someone like that tenured in the department." (A. IV, 95).

Like Dr. Williams' other testimony, this testimony is unsupportive of any reasonable inference in Petitioner's favor. It indicates that Dr. Fernandez knew before the tenure decision that Petitioner had been *critical of the department*, not Dr. Fernandez himself. It provides no clue as to the type or nature of critical remarks by the Petitioner of which Dr. Fernandez was aware and, most importantly, leaves totally unanswered the question of whether Dr. Fernandez knew of these criticisms prior to his decision on April 13, 1972.

Petitioner finally relies upon testimony from his wife (who, despite her own criticism of Dr. Fernandez, was granted tenure at the same time the petitioner was denied tenure.) She stated:

> "I asked why he had been so cruel as to grant me a job and not my husband. He waived a copy of the Self-Study at me and began reading comments from it. I knew who made these comments. I knew your husband was a troublemaker; that it was your husband who was going around the department stirring up trouble for me and having people make these comments. But now, I wonder if you were the one, that you were also critical .... I pointed out that that was what we were supposed to do. We were supposed to, according to the Southern Association, answer that faculty questionnaire honestly-that he had done nothing wrong in doing that." (A. IV, 22-23)[7]

Like the testimony of Thomas Williams, the testimony of Petitioner's wife may provide a source for speculation, but it provides no source for any reasonable inference. Her testimony is that Dr. Fernandez knew of her husband's criticisms after the tenure decision, but her testimony shed no light on whether he knew of these criticisms before he made his decision. Equally important, her testimony relates solely to the Self-Study Report and sheds no light whatsoever upon the time at which Dr. Fernandez, if ever, learned that

[7]Interestingly, Petitioner's wife, in an affidavit filed earlier in this case, referred generally to this conservation but did not state that Dr. Fernandez made any connection between the self-study and his decision to deny Petitioner tenure. (See A. IV, 52)

Petitioner had been critical of him for "stacking" the Self-Study Committee.

In sum, the testimony upon which Petitioner relies leaves unanswered the crucial question of whether Dr. Fernandez knew prior to April 13, 1972 that Petitioner was critical of him for allegedly stacking the Self-Study Committee. One can always speculate as to when Dr. Fernandez learned of the Petitioner's criticisms, but as this Court admonished in *Galloway v. U.S., supra*, "speculation [cannot be] allowed to do duty for probative facts."[8]

Beyond the merits of his case before the jury, Petitioner also argues that the Circuit Court unsurped the jury's function by weighing the evidence and judging the credibility of witnesses, particularly in regard to Dr. Fernandez' knowledge of Petitioner's criticisms. In support of this argument, Petitioner identifies occasional references by the Circuit Court to evidence as weak or attenuated. (Petition, p. 15) To characterize this evidence as weak or attentuated is simply to state the obvious and is not indicative of the weighing of evidence by the Circuit Court. Moreover, to describe the Petitioner's evidence on the critical issue before the jury as weak or attentuated is to give it too much credence.

In a final effort to lend substance to his position, the Petitioner argues that the Circuit Court violated this Court's decision in *Tennant v. Peoria* and *P.U. Railway Co.*, 321 U.S. 29 (1944) in taking the case from the jury when the evidence is in an "even balance". (Petition, p. 17-20) Petitioner seeks to create error where none exists.

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[8]Other testimony by Petitioner and his wife provides a clear answer to the time Dr. Fernandez learned of the Petitioner's criticism. Upon receiving the adverse tenure decision in April, Petitioner visited Dr. Fernandez to find out the basis for his decision. That meeting was uneventful and included no reference to the self-study. Dr. Fernandez simply responded to Petitioner "that he was sorry, that he had to cut a position." (A. IV, 109-110) Later, in May, at a meeting with the administration, Nancy Mayberry "spoke out" against Dr. Fernandez and "told the Deans what was going on in our department" (A. IV, 22) Dean Capwell gave Dr. Fernandez "a full report" of everything Nancy Mayberry said. This was Dr. Fernandez' *first* knowledge of the Mayberry's criticism and then and only then did he act in an angry and vindictive manner. He called Nancy Mayberry to his office in June, demanded that she "prove her allegations" (*Id.*) and, lashed out at the Mayberrys.

The rule for which Petitioner advocates is the rule in the Fourth Circuit and was applied in this case. The Fourth Circuit has specifically rejected the notion that when the evidence and inferences from that evidence are in equipose a case should be taken from the jury. In *Ford Motor Co.v.McDavid*, 259 F.2d 261, 266 (4th Cir. 1958), the Court said:

> "The old notion that a jury should not be allowed to draw any inference from circumstantial evidence, if the one is probable as the other, has fallen into discard and has been replaced by the more sensible rule that it is the province of the jury to resolve conflicting inferences from circumstanctial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the Court to withdraw the case from the jury when the necessary inference is so tenuous that it rests upon speculation and conjecture."

McDavid and other cases to the same effect, were cited and relied upon by the Circuit Court in the same paragraph from which the Petitioner derives his "even balance" argument. (Petition, pp. 14a-15a) To read the Circuit Court's opinion in these circumstances as adopting an "even balance" rule is totally unwarranted. Instead, the Circuit Court, in accordance with *Tennant* and *McDavid*, simply held, as it stated, that a "mere possibility" that something occurred is not sufficient to support a jury verdict.

CONCLUSION

Tenure is not a right; it is a status only conferred upon faculty members of demonstrated competence. Petitioner was provided the opportunity to demonstrate to his colleagues and students that he possessed the required competence, but he failed. Now, he would have the Courts substitute a manufactured constitutional claim for his failure and give him the tenure he does not deserve.

The Fourth Circuit clearly saw through this ruse and correctly rejected the Petitioner in his endeavors. In a final effort to gain the tenure he does not deserve, Petitioner seeks to draw inferences at odds with the facts and with reason, and to create error where none exists. His efforts should be rejected and his petition denied.

Respectfully submitted, this 19th day of August, 1982.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were served upon counsel for Petitioner by depositing said copies in the United States Mail, postage prepaid, addressed as follows:

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This 19th day of August, 1982.

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Office - Supreme Court, U.S.
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CLERK

No. 81-2191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT J. MAYBERRY,
Petitioner,

v.

WILLIAM DEES, *et al.*,
Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents have filed a brief in opposition to the Petition for Writ of Certiorari ("Resp. Br.") that illustrates vividly the fundamental error of the Court of Appeals' decision in this case. In this case a jury returned a verdict finding that petitioner ("Mayberry") had been denied tenure because he had criticized his department chairman, respondent Fernandez, in a manner that was protected by the First Amendment, and that he would not have been denied tenure in the absence of that criticism. Respondents asked the Court of Appeals to overturn the jury verdict on grounds of insufficient evidence, and the Court of Appeals did so. Under the fundamental rules that define the respective functions of judges and juries in the federal system, the only proper inquiry for

the Court of Appeals was whether the record contained any evidence which, if believed by the jury, could rationally support the verdict for Mayberry. The only question in this Court, at this stage of the proceeding, is whether the Court of Appeals' decision adhered to those fundamental rules or whether its decision violates them and sets standards at odds with them.

Respondents have defended the Court of Appeals' decision at length, and in doing so they have fallen into the same error that infected the Court of Appeals' decision. Instead of focusing on the evidence favorable to Mayberry in order to determine whether the jury's verdict in his favor had rational support, respondents wrote their brief as if all factual issues were open for redetermination. They have described extensively the evidence that supports their factual contentions; it is the same evidence that they argued to the jury and that the jury rejected. They have paid little attention to the evidence that supports the verdict. In effect, their argument throughout is that the jury reached the wrong conclusion.

The fact that respondents feel obliged to make such arguments in defense of the Court of Appeals' decision emphasizes how far from the proper course the Court of Appeals strayed. If respondents, and the Court of Appeals, had followed the governing principles and analyzed the evidence supporting the jury's verdict in the light most favorable to Mayberry (see Petn. at 14-15), they could have reached only one conclusion: that the evidence was more than sufficient to support the verdict. We outlined that evidence in the Petition (Petn. at 3-6), and will not repeat it here. It is enough to say that all the support which the verdict needs can be found in a single piece of evidence. That evidence is Mrs. Mayberry's testimony that she pointedly asked respondent Fernandez why he had denied tenure to her husband; in response, Fernandez "waived a copy of the self-study" at her and declared "I knew . . . it was your husband who was going around the Department stirring up trouble for me

and having people make these comments" (Tr. 36-37). The jury was entitled to believe this testimony and to regard it as an unequivocal admission by Fernandez that Mayberry's protected criticism had been the reason for his decision.[1]

---

[1] In an exercise of unduly parsimonious construction, respondents argue that the jury could not rationally consider this testimony to be such an admission. They say that Fernandez did not specify *when* he learned of Mayberry's criticism and the admission thus does not rule out respondents' contention that he learned of the criticism only after making the tenure decision (Resp. Br. at 17). (This was also the Court of Appeals' stated reason for disregarding this testimony (Petn. App. 15a).) Such a reading does not give Mayberry the benefit of all inferences that can reasonably be drawn from it, contrary to the governing rules (see Petn at 14-15).

Respondents also argue that this testimony (and the testimony about one other similar admission) lends no support to the verdict because, although Fernandez said he denied tenure to Mayberry because he stirred up trouble during the Self-Study, he did not say that the criticism he was talking about related specifically to the allegation of "stacking" the self-study committee to suppress criticism (Resp. Br. at 17-18). Such a specific reference is unnecessary. Putting aside the fact that the jury could rationally draw such an inference from this testimony, Mayberry's protected speech was not confined to criticism about *stacking* the committee; the jury was instructed, without objection, that Mayberry's protected speech included any criticism of Fernandez regarding "the manner in which he was conducting that part of the school's business in which the public was interested" as long as such speech did not disrupt or impede the University's functioning (Tr. 516-18).

In a similar exercise, respondents argue that another witness's testimony describing another such admission by Fernandez lends no support to the jury's verdict because it referred to a decision regarding *promotion*, not *tenure* (Resp. Br. at 15-16). That argument disregards the reality that a faculty member in his final "up-or-out" year will not be promoted unless he is granted tenure—thus the promotion decision is the same as the tenure decision. Moreover, even if the two decisions were considered independent, the jury rationally could draw from the statement ascribed to Fernandez (Mayberry "was out of the question because he was a trouble-maker") an inference that Fernandez knew of Mayberry's criticism and was motivated to retaliate against him because of it with respect to both decisions.

Because of this evidence and the other record evidence supporting the verdict (see Petn. at 4-6), all of respondents' descriptions of the evidence supporting their contentions, and all of their arguments from it, are simply beside the point. Nonetheless, their brief creates several serious misimpressions about the contents of the record in this case and the effect of the Court of Appeals' decision, which we feel compelled to correct.

1. Respondents repeatedly assert that Mayberry was the least worthy candidate for tenure among the five who were under consideration in the spring of 1972, and that Mayberry's faculty colleagues regarded him as the least worthy candidate. They pepper their brief liberally with quotations, to give the impression that the record is replete with evidence that everyone considered Mayberry a poor choice for tenure and thought the other candidates superior (Resp. Br. at 4-5, 9, 10 n.5, 14-15). If respondents had described the sources of all those quotations, it would be clear that the only evidence supporting their "least worthy" argument is Fernandez's testimony as to his own opinion (see Petn. at 16 & n.13).

Fernandez testified that he thought Mayberry was the least worthy; he did not explain why he thought so (Tr. 279). The jury, of course, was entitled to disbelieve that testimony and conclude that it was a mere self-serving pretext. The source of many of the vivid quotations that appear in respondents' brief is the letter that Fernandez wrote to his administrative superiors recommending that tenure be granted to the other candidates and denied to Mayberry (Resp. Br. at 14).[2] Not surprisingly, in that letter Fernandez spoke of each of the favored four in glowing terms, and then cryptically stated that he recommended Mayberry not be given tenure "[b]ecause of the need to reduce the size of the Spanish faculty" (D. Exh.

[2] That letter was defendants' exhibit 5 at trial; respondents cite it as "A.III, 4-5," referring to its appearance in the appendix filed in the Court of Appeals.

5). The key issue that the jury was asked to decide was whether the statements Fernandez made in that letter were mere pretexts for urging that Mayberry be denied tenure. The jury was entitled to disbelieve the contents of that letter, just as it was entitled to disbelieve his testimony at trial. It appears that the jury did, in fact, disbelieve Fernandez's statements, because it found that Mayberry would not have been denied tenure in the absence of his protected speech.[3]

The only sources respondents cite that do not consist simply of Fernandez's own statements are two sets of anonymous documents that respondents placed in evidence, over petitioner's objection, at the close of trial (Tr. 364-68). Mayberry had no opportunity to cross-examine about them. They were not the subject of any testimony; indeed, Fernandez did not testify that he had placed any weight on their contents. Even those documents do not support respondents' assertions that Mayberry was less worthy for tenure than the other four candidates, for two reasons. First, although the trial court allowed those anonymous statements in evidence, the court ruled that they could not be considered to prove the truth of their contents and so instructed the jury (Tr. 364-68). Second, the anonymous evaluations provide no basis for comparing Mayberry to the other four tenure candidates. One set consisted of anonymous evaluations of Mayberry by other faculty members (D. Exh. 6). Defendants did not offer the comparable evaluations of the other four candidates. The other set consisted of anonymous evaluations by students (D. Exh. 7). They are similarly incomplete, in that the only ones defendants offered were the evaluations by students who had taken courses from Mayberry

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[3] Another similar letter, quoted in Resp. Br. at 5, contains praise of Esther Fernandez, respondent Fernandez's wife, who had been granted tenure on his recommendation in the year prior to the decision on Mayberry. That letter also consists entirely of Fernandez's own statements (P. Exh. 29).

(Tr. 369). Defendants offered no testimony from either faculty or students to supply the crucial element of comparison between Mayberry and the others. The evaluations thus do not prove that Mayberry, as a matter of fact, was the "least worthy" candidate, and, apart from that, the jury was entitled to conclude that Fernandez had given them no consideration.

2. Respondents argue that we have misconstrued the Court of Appeals' opinion and taken certain of its statements out of context, and that the Court of Appeals did not impose on Mayberry the burden of proving that he would have received tenure in the absence of his protected speech, contrary to this Court's ruling in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (Resp. Br. at 9-12). Whatever else the Court of Appeals said or did not say in its opinion, it plainly identified two "factors" that were part of the "causality percentage of the case for which Mayberry, as plaintiff, had the burden of proof" (Petn. App. 19a), and one of those factors was "a favorable prospect, before his protected criticism was uttered, of Mayberry's receiving tenure" (*id.* 18a). That conception of the issues was a necessary ingredient in the Court of Appeals' analysis of the case. The Court's reasoning was that the evidence pertaining to Mayberry's likelihood of getting tenure prior to the criticism did not support a verdict in Mayberry's favor on this issue (*id.* 4a, 14a, 18a); and what the Court perceived as Mayberry's failure of proof on this issue was one of the two "obstacles" that it concluded Mayberry had failed "to overcome" (*id.* 19a).

3. In response to our argument in the Petition that the Court of Appeals applied an outmoded rule that a jury verdict cannot stand when a court believes the evidence to be evenly balanced (Petn. at 17-20), respondents argue that the Court of Appeals both understood and applied the correct rule because it cited earlier Fourth Circuit cases that had rejected the "even balance" rule and adopted

the proper rule (Resp. Br. at 18-19). It is true that earlier Fourth Circuit cases had rejected the "even balance" rule and adopted a rule in accord with this Court's modern decisions, and it is also true that the Court of Appeals cited one of those decisions in its opinion in this case (Petn. App. 15a). But what the Court of Appeals cited cannot change what it did. It ruled that as a matter of law the jury could not rely on Fernandez's admission from the witness stand that he "possibly" knew about Mayberry's protected speech, because, in the Court of Appeals' words, "A statement that one possibly knew implies that he possibly did not know, leaving things very close to an even balance" (Petn. App. 14a). The effect is the same as saying that if a defendant charged with murder took the witness stand and admitted that he "possibly" committed the murder, the jury would not be entitled to conclude that when he said "possibly yes," he actually meant "yes." Such a result cannot be reconciled with this Court's modern decisions on the review of jury verdicts.

4. Finally, respondents suggest that the Court of Appeals' "statistical analysis" can be disregarded because the court said it was only "illustrative" (Resp. Br. at 11). But saying that something is "illustrative" is not the same as saying that it is meaningless. Here, the Court of Appeals' "statistical analysis" served at a minimum to illustrate the reasoning that was operative in the Court's decision. And that reasoning—putting aside the problems with the choice of particular numbers and the method of multiplying them together—rested at bottom on the proposition that even if the evidence on each of two issues standing alone is sufficient to support a jury verdict, the court can set aside the verdict if it regards the evidence on each issue as weak. The principles that govern jury trials in the federal courts do not allow courts to set aside a verdict because they consider the evidence weak (Petn. at 14-17), and that rule does not change whenever the plaintiff must prove more than one element to establish his case.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for Certiorari, the writ of certiorari should be granted.

Respectfully submitted,

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